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CONVEYANCER'S NOTEBOOK

DEFENCE REGULATIONS

As a result of the annual review of the Defence Regulations there were a few casualties: 68CA, which prevented premises which had been used at any time since 1938 for residential accommodation from being used for any other purpose without the consent of the housing authority, has gone, though it will, of course, still be necessary to obtain planning permission; and 68CB, which permitted a property owner, after registration with the local authority, to let part of his property without the tenant being able to obtain security of tenure, has been revoked, except in relation to accommodation registered before December 7, 1952, and accommodation in respect of which an application for registration had been made before then. Regulations 68A and 68AA, which dealt with reconditioning of housing accommodation for agricultural workers and homeless persons, have also been revoked, except where licences were in force before December 7. (Defence Regulations (No. 2) Order, 1952 (S.I. 2091).)

The Defence Regulations authorising the requisition of land, and the power to retain requisitioned land, even though not coming within the Regulations, conferred by the Requisitioned Land and War Works Act, 1945, remain in force for a further year until December 10, 1953. (Supplies and Services (Continuance) Order, 1952 (S.I. 2094).)

RENT AND PRICE CONTROL UNDER BUILDING LICENCES

When granting a building licence it is usual to impose restrictions on the rent at which the premises can be let and the price at

which they can be sold under the Building Materials and Housing Act, 1945, as amended by the Housing Act, 1949, though many of the restrictions are ineffective for non-registration. The restrictions automatically expire on December 20 next, so that a person who is considering selling may well desire to hold his hand until then. These restrictions are not renewed annually, so that there would have to be fresh legislation if the Government intends to extend the period. The effect of extending the limit for licence-free building has already enabled a certain number of conversions into flats to take place without attracting the restrictions, but the rents may still be revised by a rent tribunal under the Landlord and Tenant (Rent Control) Act, 1949.

CHARITABLE TRUSTS

The Report of the Committee on Charitable Trusts (Cmd. 8710, price 6s. 6d.) contains a number of recommendations which are not likely to be controversial and which, if carried into effect, will considerably simplify and improve the law. One of these is of considerable general interest, namely, the suggestion that the range of trustee investments should be extended to comprise, subject to certain safeguards, the debentures and stock and shares (including equities) of financial, industrial and commercial companies quoted on the London Stock Exchange. The Committee also recommend the repeal of the obsolete restrictions on mortmain and charitable uses, and the enactment in a single code of the scattered legislation on charitable trusts in a shortened, simplified and amended form. However the word "charity" is defined there are bound to be difficulties and the Committee recognised that redefinition, based on Lord Macnaghten's classification in *C.I.R.* v. *Pemsel* [1891] A.C. 531, would have to allow flexibility in interpretation. Other recommendations deal with registration, annual accounts and their audit and the vesting of most charity land and investments in the Official Trustees of Charity Land and Charitable Funds, to be renamed the Official Custodians of Charity Land and Charitable Funds to remove misconception of their functions.

Recent decisions have shown how drafting errors have rendered intended trusts void, particularly the "charitable or benevolent" group. Legislation to validate these trusts is to be introduced immediately. The proposed bill is, consistently with the recommendation, strictly limited in scope. It will only apply to dispositions made before December 16, 1952, which authorise the application of the trust property to both charitable and non-

charitable objects. The trust property will be applied for the charitable purposes only. Where the disposition has been in operation for less than six years, any person who would, apart from the bill, be entitled to the trust property, will be entitled to challenge the validity of the trust by proceedings commenced within one year of the passing of the bill.

Government Policy on Leaseholds

Long Leases

The White Paper announcing the Government policy on leaseholds (Cmd. 8713, price 9d.) has now been issued. Leasehold enfranchisement is rejected and, instead, the Rent Restrictions Acts will apply to residential property held on long leases. Where a dwelling-house is within the statutory limits of rateable value under the Acts and is occupied under a tenancy originally granted for more than 21 years, the tenant, on the expiration of the tenancy, will be entitled to remain on as a statutory tenant even though the rent is less than two-thirds of the rateable value. The landlord will, however, be entitled to obtain possession not only on the present statutory grounds but also if he can prove that he reasonably requires possession for the purposes of a scheme of redevelopment. The machinery for converting a contractual to a statutory tenancy is to continue the ground lease, the landlord being entitled either to seek possession or to make proposals for the creation of a statutory tenancy. The landlord would have to put the property in repair, but would be reimbursed by the tenant either in a lump sum or in instalments. The rent and terms would be fixed by agreement or, failing agreement, by the county court assisted as necessary by technical assessors. It seems very hard that a landlord, who may ill be able to afford it, should have to put his property in repair for the benefit of a tenant who is in breach of covenant, but it is some consolation that he is going to be able to get a "reasonable" rent. In one case this is not so: where there is a subtenant already protected as against the mesne landlord, he will now be protected as against freeholder (reversing *Knightsbridge Estates* v. *Deeley* [1950] 1 All E.R. 577), and presumably the freeholder will not even be able to obtain possession because he wants to redevelop.

As the proposed legislation cannot be introduced this session, a Bill to extend the Leasehold Property (Temporary Provisions) Act, 1951, until Christmas, 1954, has been introduced.

Business Premises

The Government propose to amend drastically the Landlord and Tenant Act, 1927. Instead of compensation for adherent goodwill with the right to a new lease for a limited period in exceptional circumstances, security of tenure, analogous to that in the case of agricultural holdings, and compensation for disturbance is to be substituted. The landlord will be entitled to resume possession if he requires the premises for the purpose of his own business or for the purpose of a scheme of redevelopment. There will be other grounds for possession, *e.g.*, substantial breach of covenant, suitable alternative accommodation. Otherwise the tenant may require a fresh tenancy at the fair contemporary market rent (excluding any value attributable to the tenant's improvements or goodwill). In default of agreement as to rent or terms, the county court (assisted as necessary by assessors) or High Court will determine the question. The present system of referring the question to a referee first is to be abolished. The right to a new lease will be extended to professional premises.

Where the landlord is entitled to recover possession and the tenant is not at fault, the tenant will be entitled to fixed compensation for disturbance, being the rateable value where the tenant has been in occupation not more than 14 years and twice the rateable value in other cases. Where a lease is granted for not more than five years it will be possible for the landlord to contract out of his obligation to pay compensation.

Miscellaneous

The Government accept in principle a number of recommendations for the amendment of the law relating to landlord and tenant generally. They include : (i) the enactment of a code of standard covenants deemed to be included in leases and tenancy agreements, unless otherwise agreed; (ii) the extension of the Leasehold Property (Repairs) Act, 1938, to all classes of premises and irrespective of rateable value; (iii) the extension to absolute covenants of the implied proviso to covenants not to assign, etc., without consent, that such consent shall not be unreasonably withheld; and (iv) the similar extension of the similar implied proviso to covenants against improvements without consent and the extension of the proviso to covenants against user.

STAMP DUTY ON AGREEMENTS FOR THE SALE OF A BUSINESS

A correspondent writes:—"It is beyond doubt that thousands of contracts for the sale of businesses are signed every year over a

sixpenny stamp only, without being followed by an assignment of the goodwill stamped with *ad valorem* duty. What really is the legal effect of an agreement for the sale of a business stamped with a sixpenny stamp only?" He points out that Mr. Beattie, in his article on the "Acquisition of a Business," Vol. 16, p. 245, emphasised at p. 246 that such a contract attracts *ad valorem* duty, and that this is stated in all standard books; and refers, by way of contrast, to the passage in Gibson's Conveyancing (17th ed., pp. 137–8). We agree that the liability to duty is worth examination.

The ordinary agreement under hand only attracts a 6d. stamp and, like all instruments except those attracting *ad valorem* duty, stamping should take place prior to signature. If an adhesive stamp is not used and cancelled on signature, the stamp will have to be impressed. The Commissioners allow the stamp to be impressed within 14 days after signature, pursuant to their power to waive penalties under the Stamp Act, 1891, s. 15, but they can decline to do so and in certain cases do. One of those cases is where the agreement under some other provision attracts a higher duty.

Section 59 of the Stamp Act, as amended by the Revenue Act, 1909, s. 7, reads as follows:—

> "(1) Any contract or agreement . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share or property of or in any ship or vessel, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest or property contracted or agreed to be sold.
>
> "(5) Provided also that where any such contract or agreement is stamped with the said fixed duty (*a*), and a conveyance or transfer made in conformity with the contract or agreement is presented to the Commissioners for stamping with the ad valorem duty chargeable thereon within the period of six months after the first execution of the contract or agreement, or within such longer period as the Commissioners may think reasonable in the circumstances of the case, the conveyance or transfer shall be stamped accordingly, and the same, and the said contract or agreement, shall be deemed to be duly

(*a*) [*i.e.*, 6d. or 10s. if under seal].

stamped. Nothing in this proviso shall alter or affect the provisions as to the stamping of a conveyance or transfer after the execution thereof."

In the simple case of the sale of business premises, stock in trade and goodwill by one person to another, the contract bears a six-penny stamp and the conveyance of the land and goodwill bears *ad valorem* duty, the value of the stock in trade attracting no duty as it passes by delivery. Few practitioners are likely to fall into the trap of transferring the stock in trade by deed. Where the title to the land is registered the transfers of the land and goodwill would be effected by separate instruments, and indeed this may be a convenient practice even in the case of unregistered land. A few years ago a purchaser's solicitor proposed to take a transfer of the land only and not bother about the transfer of the goodwill and the vendor's solicitors objected. The opinion of the Law Society was taken and they ruled that there was nothing improper in the course proposed by the purchaser's solicitor and the vendor was not entitled to object: Law Society's Digest, Supp., 1951, Opinion No. 1366 (b). Naturally, it would not be possible to incorporate a certificate under the Finance Act, 1952, s. 73, where the total consideration passing on the sale exceeds £3,500.

What, then, is the position of a purchaser who does not take an assignment of the goodwill? So far as the acts of the vendor are concerned he is protected, for he can at any time complete his title by calling for an assignment, if necessary adding a claim for specific performance to a more substantive claim against the vendor. Even against third parties the purchaser would not normally have to rely on the purchase of the goodwill; he would rely on the fact of his carrying on a business in the name of the vendor. No doubt there are some cases where he would have to complete his title, as where the third party set up in business as successor to the vendor. Accordingly, a purchaser may well decide not to take an assignment of the goodwill but complete his title if this turns out to be necessary.

Goodwill is not, however, the only adjunct of a business that attracts *ad valorem* duty. A consideration of a contract to transfer a business to a limited company in return for shares shows the position clearly, for in this case *ad valorem* duty under section 59 cannot be avoided: the contract cannot be filed until the duty is paid: *R.* v. *Registrar of Joint Stock Companies* (1888) 21 Q.B.D. 131. Transfers of legal estates in land attract *ad valorem* duty on the conveyance and not on the contract. This cannot be avoided by the vendor declaring a trust in favour of the purchaser, for this

is treated as a conveyance or transfer on sale: *Chesterfield Brewery Co.* v. *I.R.C.* [1899] 2 Q.B. 7. No *ad valorem* duty is payable on cash in hand or on current account at the bank, loose plant, stock in trade or furniture, but it is payable on the contract in respect of tenants' and trade fixtures on leasehold property, book debts, cash on deposit account at the bank (*Troup* v. *C.I.R.* (1891) 7 T.L.R. 610) and goodwill. Some duty may be saved by transferring money from deposit account to current account.

It will be seen, therefore, that even apart from cases where the purchaser is obliged to stamp his contract *ad valorem*, he may sometimes need to complete his title. He could not take an action on a book debt to trial without an assignment and he might, on the expiration of his lease, have to establish his title to fixtures.

SOLICITORS' REMUNERATION IN NON-CONTENTIOUS BUSINESS

The Solicitors' Remuneration Order, 1953 (S.I. No. 117), and the Solicitors' Remuneration (Registered Land) Order, 1953 (S.I. No. 118), have now been made. Contentious business has not been affected, but the item charges for non-contentious business have been completely altered and certain increases in most of the scale charges have been made. Under the Solicitors' Remuneration Order, 1883, charges for non-contentious work are divided into two schedules. Part I of Schedule I deals with scale charges on sale, purchases and mortgages and Part II with leases. Schedule II deals with item charges. Part II of Schedule I is unaffected, but an entirely new scale has been substituted for the old scale in Part I. This is set out opposite.

It will be noticed that there is now no scale charge for negotiating a sale or purchase and the matter now falls within Schedule II. The general effect of Schedule I so far as sales and purchases are concerned is to leave unaffected scale charges where the transaction does not exceed £10,000. Above £10,000 there is an increase from 7s. 6d. per cent. to 10s. per cent. and the old limit at £100,000 is abolished. There is also an increase in respect of the scale charges of a mortgagor's or mortgagee's solicitor for negotiating a loan.

Apart from certain consequential amendments, rules 1 and 11 applicable to Part I of Schedule I have been altered and a new rule 13 added. The new rules 1, 11 and 13 read as follows:—

"1. The commission for deducing title and perusing and completing conveyance—

(a) on a sale by auction, is to be chargeable on each lot of property, except that where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys several such lots and takes one conveyance, and only one abstract is delivered, the commission is to be chargeable upon the aggregate price of the lots;

(b) on a sale by private treaty of two or more properties, is to be chargeable upon the aggregate price of the properties, except that where properties are held under different titles and a separate price is specified for each

SCHEDULE I, PART I

SCALE

	(1) For the first £1,000	(2) For the second and third £1,000	(3) For the fourth and each subsequent £1,000 up to £10,000	(4) For the remainder without limit
	per £100 s. d.	per £100 s. d.	per £100 s. d.	per £100 s. d.
Vendor's solicitor for conducting a sale of property by public auction, including the conditions of sale—				
When the property is sold	30 0	15 0	7 6	3 9
When the property is not sold, then on the reserved price	15 0	7 6	3 9	1 10½
NOTE: *A minimum charge of £7 10 0 is to be made whether a sale is effected or not.*				
Vendor's solicitor for deducing title to freehold or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)	45 0	30 0	15 0	10 0
Purchaser's solicitor for investigating title to freehold or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)	45 0	30 0	15 0	10 0
Mortgagor's solicitor for negotiating loan ..	16 10½	16 10½	5 7½	3 9
Mortgagor's solicitor for deducing title to freehold or leasehold property, perusing mortgage and completing ..	45 0	30 0	15 0	10 0
Mortgagee's solicitor for negotiating loan ..	33 9	33 9	11 3	7 6
Mortgagee's solicitor for investigating title to freehold or leasehold property, and preparing and completing mortgage	45 0	30 0	15 0	10 0

property, the commission is to be chargeable on the price of each such property in respect of which a separate conveyance is taken.

"11. The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. The scale for negotiating a loan payable to a mortgagee's solicitor shall apply only to cases where the solicitor arranges and obtains the loan from a person for whom he acts. In cases of sales under the Lands Clauses Consolidation Act or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply.

"13. The scales for deducing and for investigating title shall apply to sales and purchases of leasehold property although there may have been no previous assignment or other dealing with the leasehold interest since the grant of the lease."

It will be observed that the old rule, that on a compulsory acquisition of unregistered land the scale does not apply in respect of the vendor's solicitor's costs, has been perpetuated, but, having regard to the terms of the new Schedule II, it seems probable that the scale charge will be asked for and allowed in practice.

There is an entirely new Schedule II, which is set forth below.

"SCHEDULE II

Any business, not being contentious business, for which no charge is prescribed by Schedule I, or in respect of which the solicitor has, in accordance with paragraph 6 of this Order, elected to charge under Schedule II.

Such sum as may be fair and reasonable, having regard to all the circumstances of the case and in particular to—

(1) the complexity of the matter or the difficulty or novelty of the questions raised;
(2) the skill, labour, specialised knowledge and responsibility involved on the part of the solicitor;
(3) the number and importance of the documents prepared or perused, without regard to length;
(4) the place where and circumstances in which the business or any part thereof is transacted;
(5) the time expended by the solicitor;
(6) where money or property is involved, its amount or value; and
(7) the importance of the matter to the client:

Provided that—

(*a*) without prejudice to the provisions of sections 66, 67 and 68 of the Solicitors Act, 1932, (which relate to taxation of costs) the client may require the solicitor to obtain a certificate from the Law Society certifying that the sum charged is fair and reasonable or, if it is not, what is a fair and reasonable sum, and the sum so certified, if less than that charged, shall, in the absence of taxation, be the sum payable;

(*b*) before the solicitor brings proceedings to recover costs on a bill delivered under this Schedule, he must, unless the costs have been taxed, have drawn the attention of the client in writing—

(i) to his right under paragraph (*a*) of this proviso to require the solicitor to obtain a certificate from The Law Society, and

(ii) to the provisions of the Solicitors Acts, 1932 to 1950, with regard to taxation of costs;

(*c*) the client shall not be entitled to require the solicitor to obtain a certificate from The Law Society under paragraph (*a*) of this proviso after the bill has been either taxed or paid;

(*d*) on any taxation of a bill delivered under this Schedule it shall be the duty of the solicitor to satisfy the Taxing Master as to the fairness and reasonableness of his charge; and

(*e*) if the Taxing Master allows less than one half of the amount charged, he shall bring the facts of the case to the attention of The Law Society."

It will be seen that item charges are now entirely at large, though costs are still subject to taxation in the usual way. There is one innovation which is of considerable interest and that is the provision enabling the Law Society to certify whether the amount sought to be charged is fair and reasonable. It is impossible to say at the moment whether this innovation will be a success in practice, and this will depend upon the machinery set up by the Law Society to deal with bills referred to it.

Registered Land

In the case of registered land increases are allowed throughout the scale. The new scale is set forth below.

REGISTERED LAND

Scale of Remuneration for Transfers on Sale, Charges, Sub-Charges, Mortgages, Sub-Mortgages and Transfers thereof

Value of Land or Amount of Charge	*Scale of Remuneration*
(1) Up to and including £200	£4
Over £200 but not exceeding £300	£4 10s.
For each additional £100 thereafter up to £1,000	£1 10s. per £100
For the second and third £1,000	£1 per £100
For the fourth £1,000	10s. per £100
For each subsequent £1,000 up to £13,000 ...	7s. 6d. per £100
For each subsequent £1,000 up to £17,000 ...	5s. per £100
For the remainder without limit	4s. per £100
(2) Fractions of £100 under £50 are to be reckoned as £50. Fractions of £100 above £50 are to be reckoned as £100.	

Apart from consequential amendments there is one alteration to the Solicitors' Remuneration (Registered Land) Order, 1925. In

paragraph 1 of the Order a new sub-paragraph has been inserted which reads as follows:—

> "When a solicitor is acting for a purchaser of land and also for a person taking a charge thereon, he is to be entitled to receive only one-half of the charges of the solicitor of the person taking the charge up to £5,000 and on any excess above £5,000 one-fourth thereof, in addition to his full charges on the transfer on sale to the purchaser of the land."

This sub-paragraph is to be lettered (l) and the original sub-paragraphs (l) and (m) become (m) and (n) respectively. The effect is to bring the charges of a solicitor acting for a purchaser-mortgagor and mortgagee in the case of registered land into line with the charges in the case of unregistered land.

The new Orders come into force on March 1 and apply to all business for which instructions are accepted on or after that date.

The far more controversial question of charges for contentious business has still not been resolved. It is universally admitted that this is the least paying of all solicitors' work but there seems to be great difficulty in obtaining even a modest increase in these charges, despite the understanding that these would be reconsidered when the Legal Aid and Advice Act, 1949, came into force.

ASSISTANCE FOR IMPROVEMENTS

By J. F. Garner, ll.m., Town Clerk of Andover

In these days of shortage of housing accommodation, conveyancers may be consulted by their clients regarding proposals to improve houses or other buildings, and the assistance that may be expected from the local authority in such projects. It is the purpose of these notes to explain the statutory provisions contained in the Housing Act, 1949, relating to this subject, and their practical application, but at the outset it must be made clear that these provisions confer powers, not duties, and that therefore the ensuing narrative merely describes what a local authority (*a*) may do; it by no means follows that a particular local authority will necessarily agree to use their powers in an individual case. Even if all the details of the particular case exactly fit the conditions of the statute and any relevant Ministry Circular, the local authority cannot be compelled by any legal process or administrative action from higher authority to use their powers given to them by Parliament (*b*); in fact, a number of local authorities refuse, as a matter of principle, to implement the sections.

The assistance that may be rendered to an owner wishing to "improve" his house (or building) falls into two classes, (I) improvement grants, and (II) advances on mortgage. These two classes of assistance should be considered separately, although the powers relating to both subjects are contained in the Housing Act, 1949 (*c*).

(I) Improvement Grants

1. *Power to make a grant.* These grants are payable by a local authority under Part II of the Act, and section 20 thereof provides that a local authority may make a grant in respect of:

(a) the provision of dwellings, by a person other than a local authority or county council, by means of the conversion of houses or other buildings; or

(b) the improvement of dwellings by such a person.

(*a*) Used in this article to mean a local housing authority; *i.e.*, the council of a borough or urban or rural district.

(*b*) It seems that the rarely used default powers of the Minister of Housing and Local Government contained in the Housing Act, 1936, ss. 169–175, do not apply to powers under the Act of 1949.

(*c*) Hereafter in this article referred to as "the Act," and references to sections are to sections of the Act, unless the contrary intention is expressed.

" Conversion " here does not necessarily mean the execution of elaborate structural alterations, but it would include, *e.g.*, the breaking-up of a large house into a number of one-roomed tenements, each with its own cooking and washing accommodation (*d*). " Improvement " includes the alteration or enlargement of the dwelling, and the execution of repairs thereto other than works " of ordinary repair " (*e*), except in so far as such works may be incidental to or connected with the alteration, enlargement or works of " extraordinary " repair (*f*). " Dwelling " is not defined in the Act, and it must therefore, presumably, be understood in the ordinary sense of a building in which " people live or which is physically capable of being used for human habitation " (*g*).

If the building to be improved is not already a " dwelling," the proposal must be to convert it into a dwelling or dwellings, and it seems that, if the building when improved will provide, *e.g.*, office accommodation as well as a dwelling or dwellings, any grant made will be in respect only of that portion of the total cost which is incurred on the provision of the dwelling(s).

2. *Applications for grants.* Applications for grants (*h*) must comply with section 20 (2), and full particulars of the works proposed must be given, complete with plans, specifications and estimates; Form B, available from the local authority (*i*), should be used for this purpose. Unfortunately, this means in practice that the applicant must engage an architect, or other suitably qualified person, before he can be sure that the local authority will entertain his application (*j*). If the building is subject to a building preservation order, or is a " listed building," under section 29 or 30 of the Town and Country Planning Act, 1947, it is desirable that the observations of the local planning authority on the proposals should be obtained before any expenses are incurred.

(*d*) See *Stack* v. *Church Commissioners* [1952] 1 All E.R. 1352, decided on the use of the word in a similar context.

(*e*) It is far from clear as to what this unusual expression means. " Repair," said Lord Atkin in *Calthorpe* v. *McOscar* [1924] 1 K.B. 716, Woodfall, p. 697, " connotes the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged. It involves renewal of subsidiary parts; it does not involve renewal of the whole." How then can repair be said to be either " ordinary " or " extraordinary "? There cannot be intended any reference to the terms of a lease, for the premises need not necessarily be in fact let.

(*f*) See definition of " improvement " in s. 36 (2).

(*g*) *Per* Lord Atkinson in *Lewis* v. *End* [1906] A.C. 299, at p. 304.

(*h*) Details relating to applications generally are contained in a pamphlet issued by the former Ministry of Health and available on application from the local authority. The pamphlet is also reproduced in Ministry of Health Circular 90/49.

(*i*) This form also is reproduced in Circular 90/49.

(*j*) It is suggested that tentative inquiries should be made at the local council offices at as early a stage as possible.

3. *Requirements for acceptance.* The local authority may, of course, impose practically any requirements they wish as conditions subject to which they will approve an application for a grant, and in practice no application will be accepted unless and until the Ministry of Housing and Local Government have approved the proposals (*k*). The following, however, are statutory requirements that must be complied with before any application may be approved by the authority:

(i) the authority must be satisfied that the dwelling(s) to be provided or improved will provide "satisfactory housing accommodation" (*l*) for a period of at least 30 years from the date of the completion of the works;

(ii) the dwellings must comply with the Minister's standards of construction, physical condition, provision of services and amenities. These standards are specified in Circular 90/49, and are those laid down as the standard for a satisfactory house in the Report of the Standards of Fitness for Habitation Sub-Committee of the Central Housing Advisory Committee; they are far-reaching, although a particular requirement may be disregarded, with the consent of the Minister, if conformity with the requirement would be impracticable in the particular case (*m*);

(iii) the applicant must have an interest for an estate in fee simple absolute in possession (*n*), or for a term of years absolute in possession of which at least 30 years are still unexpired, in all the land on which the improvement works are to be executed;

(iv) the amount of the expenses for each dwelling concerned must be not less than £150, and not more than £800 (*o*);

(*k*) This is not expressly provided for in the Act, but Ministry approval is clearly a condition of payment of the Exchequer contribution to the local authority, under s. 25.

(*l*) This expression is not defined in the Act.

(*m*) s. 20 (3), proviso.

(*n*) It is not clear whether this means that the applicant need not necessarily have a legal estate; if so, an applicant could apply as soon as he had entered into a binding contract to purchase the property. In the case of settled land, or land held on trust for sale, it seems that either the person having the powers of a tenant for life or the trustees of the settlement would be entitled to apply for a grant. Any grant finally received by the applicant, whether paid in a lump sum or by instalments would normally be capital moneys, unless the improvement works had been financed out of the private pocket of the tenant for life.

(*o*) The original figures appearing in s. 20 (4) are £100 and £600 respectively, but these amounts were increased to the amounts stated, as from November 1, 1952, by the Housing (Improvement Grants) (Expenses) Regulations, 1952, S.I. 1952, No. 1819. The maximum amount may be exceeded in particular cases with the Minister's consent, if the local authority are satisfied that the circumstances justify it; the Minister has asked (see Circular 90/49) local authorities to give special consideration to applications in respect of buildings of architectural or historic interest.

(v) no dwelling to which the application relates may be one to which conditions specified in section 3 of the Housing (Rural Workers) Act, 1926, for the time being apply, or in respect of which conditions have been imposed pursuant to the making of an improvement grant under the 1949 Act on a previous occasion (*p*);

(vi) the work must be executed to the satisfaction of the local authority (*q*).

In addition, the local authority will probably require to be assured that planning permission (where appropriate) has been, or will be, obtained for the proposed development. No building licence will be necessary if the application is approved (*qq*).

4. *Payment of grants.* When the authority notify an applicant that they have approved his application for a grant, they will inform him of the amount which they regard as the " approved expense," *i.e.*, the amount of the cost of the proposed works which in the opinion of the local authority is properly ascribable to the execution of the works of improvement, and it is on this " approved expense " that the amount of the grant to be paid will be assessed (*r*).

The grant fixed by the local authority may be such fraction of the approved expense, not exceeding one-half thereof (*s*), as they may determine. The grant may be paid as a lump sum, or by instalments as the work proceeds, provided that the aggregate of all instalments paid at any time does not exceed half the aggregate cost of the works actually executed at that time (*t*). Further, when the application is approved, the local authority must fix a maximum rent for every dwelling to be provided or improved by means of the works, unless in the latter case the dwelling has not been let as a dwelling for a period of five years preceding the date of the application. The notification of the approval of the application (*u*) will give particulars of this maximum rent, and will also set out the effect of section 23 of the Act, which prescribes conditions which will apply to each dwelling in respect of which an improvement grant has been made, for a period of 20 years from the date when it first becomes fit for occupation after completion of the improvement works.

(*p*) See ss. 28 and 27.
(*q*) s. 21 (3).
(*qq*) Defence Regulation 56A, Art. (5) (b).
(*r*) s. 20 (5).
(*s*) This fraction may be exceeded in a particular case, with the consent of the Minister, where the maximum amount prescribed under s. 20 (4) has been exceeded: s. 21 (1). and note (*o*), *supra*.
(*t*) s. 21 (2), proviso.
(*u*) See Form C, scheduled to Circular 90/49.

5. *Conditions.* The conditions which will be applicable to each dwelling "assisted" as above mentioned may be summarised as follows:

(i) the dwelling may not be used for purposes other than as a private dwelling-house, except with the written consent of the local authority;

(ii) where a maximum rent has been fixed by the local authority, that rent may not be exceeded (*v*), and in other cases the rent charged may not exceed an amount equal to the aggregate of the rent at which the dwelling was last let and a sum calculated at a rate not exceeding 6 p.c. p.a. of the portion of the approved expense of executing the improvement works that fell to be borne by the applicant, and no fine or premium, etc., may be taken in addition to the rent;

(iii) except in the case of a dwelling for the time being occupied, otherwise than by a tenant, by a member of the agricultural population in pursuance of a contract of service (*w*), the dwelling must, at all times when it is not occupied by the original applicant or a member of his family (*x*), or a person to whom the interest of the applicant has been devised by him, be let or be kept available for letting at a rent not exceeding that mentioned in (ii), *supra*;

(iv) all reasonable steps must be taken to keep the dwelling in all respects fit for human habitation (*y*);

(v) the owner of the dwelling must, on request by the local authority, certify that these conditions are being complied with;

(vi) if a tenancy of the dwelling is assigned or the tenant parts with possession thereof, there must be no payment (direct or indirect) made in consideration thereof;

(vii) while the dwelling is occupied, otherwise than as a tenant, by a member of the agricultural population in pursuance of a contract of service, if the contract is determined by less than four weeks' notice given by the employer, by

(*v*) Except with the direction of the local authority, under s. 29, where further works are carried out on the dwelling.

(*w*) See Housing Act, 1952, s. 2 (2) and (5).

(*x*) The present writer made a few observations on the strange results that may arise from this provision, in an article appearing in the issue of this Journal for September, 1949 (Vol. 13, at p. 328).

(*y*) It is submitted that the stringent requirements of Circular 90/49 (see para. 3 (ii), *supra*) do not apply here, but that the standard required is that expected of a landlord under the Housing Act, 1936, s. 2, where that section applies (see, *e.g.*, *Summers* v. *Salford Corporation* [1943] A.C. 283).

dismissal of the employee without notice, or by death of either party, then the employer or his personal representative must permit the employee (or, in the case of his death, any person residing with him at his death) to continue to occupy the dwelling free of charge from the determination of the contract until the expiration of a period of four weeks from the date on which the notice was given or, if the contract was determined otherwise than by notice, from the date on which it was determined (*z*).

These conditions are registrable in Part IV of the appropriate local land charges register (*a*).

6. *Enforcement of conditions.* Whenever there is a breach of any of these conditions during the period of 20 years, an appropriate proportion (*b*) of the grant paid, together with compound interest thereon at the prescribed rate (*c*) with yearly rests, may be demanded (*d*) by the local authority, and thereupon is repayable to them by the owner for the time being of the dwelling (*e*). If, on the other hand, the local authority are satisfied that the breach is capable of remedy, or that it was not due to the act, default or connivance of the owner, the authority may with the consent of the Minister direct that these provisions shall not apply to the breach (*f*). Where repayment is demanded, the authority will be able to sue, if necessary, to recover the money, but process will be through the county court as for a contract debt, as the statute does not provide for the money to be recoverable summarily as a civil debt, as is so often the case in administrative statutes (*g*). Alternatively, the local authority will be able to apply for an injunction from the local county court to restrain a breach or apprehended breach of any of the statutory conditions (*h*). Similar injunction proceedings may be open to the landlord, as the conditions are to be deemed to be " part of the terms of any lease, agreement

(*z*) Housing Act, 1952, s. 2 (3) and (4); the other conditions set out in the text are contained in s. 23 (1) of the 1949 Act.

(*a*) s. 23 (5), and Housing Act, 1949 (Register of Conditions) Rules, 1951 (S.I. 1951, No. 185). For a discussion of the effect of a failure to register the conditions, see Conveyancer's Notebook in the issue of this Journal for March, 1950 (Vol. 14, at p. 3).

(*b*) *i.e.*, a part proportionate to the extent to which the period of 20 years remains unexpired at the time of the breach.

(*c*) Formerly 4 p.c. p.a.; now 5 p.c.—see the Housing (Improvement Grants) (Rate of Interest) Regulations, 1952 (S.I. 1952, No. 1087).

(*d*) In writing, signed by the clerk to the authority or his deputy: Housing Act, 1936, s. 164 (2).

(*e*) Whether or not the owner is the original applicant for the grant.

(*f*) s. 23 (2), proviso.

(*g*) For example, under the Housing Act, 1936, s. 10 (3); but see s. 23 (4) (b).

(*h*) s. 23 (4) (a).

for a lease or tenancy of the dwelling," and are enforceable accordingly (*i*).

(II) Advances

Section 4 of the Act of 1949, replacing in extended form sections 90 and 91 of the Housing Act, 1936, empowers a local authority to make advances for the " purpose of increasing housing accommodation."

1. *Power to make an advance.* A local authority (*j*) may under this section advance money for a number of purposes, of which those that are material to the subject-matter of this article are for " (c) converting into houses buildings which have been acquired by those persons or acquiring buildings and converting them into houses, *or* (d) altering, enlarging, repairing or improving houses " (*k*).

2. *Applications for advances.* Applications may be made in any form acceptable to the local authority concerned; they normally use a form locally prepared—applications should, in most cases, be made in the first instance to the clerk to the authority. Most authorities require a survey fee, and in some cases a first instalment of the council's legal fees which will fall to be paid by the applicant, must be paid when the application is lodged.

3. *Requirements for acceptance.* Authorities have an absolute discretion whether or not they will lend money for these purposes, or in the particular case before them, but if they do decide to grant a particular application for an advance, the following requirements must be complied with:

(i) the authority must satisfy themselves that " the house or houses to be constructed, altered, enlarged, repaired or improved or into which the building or buildings is or are to be converted, as the case may be, will, when the construction, alteration, enlargement, repair, improvement or conversion has been completed, be in all respects " fit for human habitation (*l*);

(ii) the advance, together with interest (*m*) thereon, must be

(*i*) s. 23 (1).

(*j*) In this section, this expression includes, as well as the authorities listed in note (*a*) on p. 13, *supra*, a county council.

(*k*) See s. 4 (1). The expressions used here do not call for any particular comment, but see para. (I) 1, *supra*.

(*l*) s. 4 (2), and see para. (I) 5 (iv), *supra*.

(*m*) The authority may charge such a rate of interest as they may think fit, but most authorities charge a rate of ¼ per cent. in excess of the rate charged for the time being by the Public Works Loan Board, according to the period of the loan (this is by analogy to the rate applicable to advances under the similar powers of the Small Dwellings Acquisition Acts, 1899–1923).

secured by a mortgage (*n*) of the lands the subject of the works of improvement, etc. (*o*);

(iii) the amount of the principal sum advanced may not exceed 90 per cent. of the value which it is estimated the mortgaged security will bear when the works of improvement have been executed (*p*), and there must be a valuation made on behalf of the authority before the advance is made (*q*);

(iv) the estate proposed to be mortgaged must be either an estate (*r*) in fee simple absolute in possession, or for a term of years absolute whereof a period of not less than 10 years in excess of the period fixed for the repayment of the advance (*s*) remains unexpired when the mortgage is executed;

(v) no advance may be made if the estimated value of the fee simple in possession free from incumbrances of the house (*t*) in respect of which assistance is to be given exceeds £5,000, but an advance may be made in addition to assistance being given by the authority under other statutory provisions (*u*).

4. *Payment of advances.* The mortgage deed may provide for the sum advanced to be paid as a lump sum on the execution of the deed, or, where works of improvement are being carried out, by instalments as the work proceeds (*v*).

(*n*) The local authority will normally insist on a legal mortgage complying with the Law of Property Act, 1925, s. 85, but it seems, strictly, that an equitable mortgage would not be prohibited by the section.

(*o*) s. 4 (3) (a).

(*p*) It may be of interest to note that this requirement of a 10 per cent. deposit, applicable also to advances under the S.D.A.A., does not necessarily apply to an advance made to a purchaser of a council house, under the Housing Act, 1936, s. 79, and the Act of 1952.

(*q*) s. 4 (3) (b) and (e).

(*r*) The word "estate" is here used as opposed to "interest" in s. 20 (3), but there seems to be no significance in this difference: see note (*n*), *ante*, p. 15.

(*s*) The duration of the term is at the discretion of the authority, but not many councils agree to granting periods in excess of 30 years, by analogy with the S.D.A.A.

(*t*) This, presumably, means the value of the house when improved, or of the building when converted into a house.

(*u*) *e.g.*, under the improvement grant provisions discussed above; there is no reason why an advance should not be made to cover the cost of the improvement works, in so far as this falls on the applicant. If structurally separate and self-contained flats are being constructed, each such flat is to be regarded as a unit for this purpose: see s. 4 (4).

(*v*) See s. 4 (3) (d). There is no prescribed limit to which such instalments may be made, but the customary rule is that no instalment shall exceed 80 per cent. of the value of the work executed at the time payment of the instalment is made.

5. *Conditions.* The mortgage deed will contain most of the usual clauses to be found in such documents, and it is also customary (*w*) to make it a condition that the house should be kept in all respects fit for human habitation during the period of the advance. Repayment may be required to be made either by instalments of principal or by an annuity of principal and interest combined, " so, however, that in the event of any of the conditions subject to which the advance is made not being complied with, the balance for the time being unpaid shall become repayable on demand by the local authority and that the said balance may, in any event, be repaid on one of the usual quarter days by the person for the time being entitled to the equity of redemption after one month's written notice of intention to repay has been given (*x*) to the local authority " (*y*).

Finally, it should be noted that the powers of section 5 of the 1949 Act, enabling a local authority to guarantee the repayment of an advance made by a building society in certain circumstances, does not apply to transactions of the type here considered.

(*w*) But not obligatory—the section is silent on the point.
(*x*) Subject to the terms of the mortgage, such a notice should normally be sent to the clerk to the authority.
(*y*) s. 4 (3) (c).

THE THOMAS TILLING STOCK CASES

By Anthony J. Bland, b.c.l., m.a., Barrister-at-Law

A. *The Thomas Tilling Stock Cases*

This article is an attempt to discover some general equitable principle applicable to what may be comprehensively called the Thomas Tilling Stock cases, of which *Re Sechiari* (*a*) is the first. This will necessitate an analysis of these cases, and of certain authority which, it is submitted, establishes the principle sought. If it exists, it will be a corollary of the much wider rule that trustees must act impartially between their beneficiaries, a rule stated by Underhill (*b*) to be that a trustee must be impartial in the execution of his trust, and not exercise his powers so as to confer an advantage on one beneficiary at the expense of another. The basic facts of the Thomas Tilling Stock cases are the same and the most recent decision provides the fullest account of them. It is proposed therefore to consider this case in some detail, as a starting point. The question before Upjohn J. in *Re Rudd's Will Trusts* (*c*)—one "now becoming familiar in this court" (*d*)—was whether a substantial sum of British Transport 3 per cent. Guaranteed Stock received by the trustees of the will of the testator as a capital bonus dividend in respect of their holding of Ordinary Stock of Thomas Tilling Ltd. ought to be treated as capital or income or apportioned between the two. The relevant facts were as follows: The testator, by his will executed in January, 1939, gave his residue to trustees on trust for sale and conversion with power to postpone conversion and to retain investments. The residue was settled, with a direction regarding income, in terms excluding the rule in *Howe* v. *Dartmouth* (*e*). The testator died in August, 1939, his investments at that date including a sum of stock of Thomas Tilling, Ltd. (referred to hereafter as "the Company"). The trustees retained a substantial part of this stock. After the coming into force of the Transport Act, 1947, the Company agreed with the Transport Commission to transfer to the Commission the transport undertakings of the Company in

(*a*) [1950] 1 All E.R. 417.
(*b*) Law of Trusts and Trustees, 10th ed., 261.
(*c*) [1952] 1 All E.R. 254.
(*d*) *Ibid.* at p. 256.
(*e*) (1802) 7 Ves. 137. For a discussion of clauses in wills excluding this rule see *infra*.

consideration of the sum of £24,800,000 satisfied by an allotment to the Company of British Transport 3 per cent. Guaranteed Stock 1963–73 at 101 per cent. On November 8, 1948, the company issued a circular to shareholders explaining these matters and stating that it proposed to recommend, at a later meeting, that on April 1, 1949, "a capital distribution be made out of the amount received to holders of ordinary stock at the rate of £5 of British Transport . . . stock . . . in respect of each £1 Stock held" (*f*). On February 21, 1949, notice of an extraordinary general meeting of the Company for March 17, 1949, was given stating that a resolution would be proposed as an ordinary resolution sanctioning the distribution referred to in the circular. The distribution was to be made to shareholders on the register of the Company at the date of the notice. The resolution was duly passed and the trustees received the appropriate sum of British Transport Stock. On February 15, 1949, the mean price of the Company's Stock was £6 4s. per £1 Stock and on February 16 the Stock went ex the capital profits dividend, the mean price being then approximately £1 8s. per £1 of Stock. As a result of these market fluctuations, a capital loss was suffered in the present case on the night of February 15–16 of some £47,000. No doubt, if the trustees had, before this night, sold their holding in the Company or the rights, the sums realised would have been capital gains, subject to application by the tenant for life for an apportionment. On the question whether the British Transport Stock was capital or income, it was conceded that, on the authority of *Re Sechiari*, *supra*, it must be treated as income. In effect, the facts in that case were the same as those in *Re Rudd*, *supra*, and Romer J. in holding the Stock to be the property of the tenant for life, followed certain well-settled principles contained in the judgment of Lord Russell in *Hill* v. *Permanent Trustee Co. of New South Wales* (*g*) and referred to in detail later in this article. The order in *Re Sechiari* was, however, made "without prejudice to any question whether, in the circumstances in the administration of the trust, the court has or would exercise jurisdiction to apportion the dividend on equitable principles between income and capital" (*h*).

On the question whether an apportionment should be made, counsel for remaindermen in *Re Rudd* submitted that, in the exceptional circumstances of the case there was a general equity apart from any question of breach of trust which enabled the court to

(*f*) [1952] 1 All E.R. at p. 257.
(*g*) [1930] A.C. 720, at pp. 730–32, and see *Re Doughty* [1947] Ch. 263; *Re Harrison's Will Trusts* [1949] Ch. 678; *Re Duff's Settlement Trusts* [1951] Ch. 923, C.A.
(*h*) [1950] 1 All E.R. 417, at p. 419.

direct such an apportionment. It was conceded, however, that the court was bound by the decisions of Vaisey J. in *Re Kleinwort's Settlement Trusts* (*i*) and Harman J. in *Re Maclaren's Settlement Trusts* (*k*) and that, in that court, any right to apportionment had to be based on breach of trust and not on any wider principle of equity. Upjohn J. therefore did not consider this aspect of the matter further and held, on the facts, that no breach of trust had been committed.

It appears from the cases that questions of breach of trust are confined to, for example, purchase by trustees of Tilling Stock with a knowledge of the possible or probable results (*l*), or at the instigation of the life tenant (*l*), or for " some other ulterior motive " (*m*). The courts have shown strong reluctance to enlarge the conception of breach of trust to take in, for example, a failure on the part of trustees to meet and consider a sale, on receipt of the circular from Thomas Tilling, Ltd.

In *Re Kleinwort's Settlement Trusts* (*i*) counsel for the remaindermen had adopted an argument which may be summarised as follows. It is the trustees' duty to keep an equal balance between tenant for life and remaindermen. In the circumstances, this is impossible, as they are faced with the alternative of either retaining the stock and benefiting the tenant for life, or selling and benefiting remaindermen. The trustees should, therefore, have come to the court for directions, and inasmuch as they did not do so, the court should now do what it would have done then and direct an apportionment. This apportionment should probably be on the basis of a sale of half the stock and a retention of half. Vaisey J. rejected this argument, and, although accepting that the jurisdiction to apportion existed, decided that it was probably limited to cases of breach of trust only. " I cannot think," said the learned judge (*n*), " that there is anything in the nature of a general rule that profits distributed, in whatever shape, as dividends and belonging under well settled principles to the tenant for life, must be subject to an apportionment for the benefit of capital."

B. *The principles of Bouch* v. *Sproule and Hill's Case*

The " well-settled principles " referred to by Vaisey J. are contained for the most part in the speeches of the House of Lords in

(*i*) [1951] Ch. 860.
(*k*) [1951] 2 All E.R. 414.
(*l*) *Per* Harman J. in *Re Maclaren* [1951] 2 All E.R. 414, at p. 420. See *infra*.
(*m*) *Per* Vaisey J. in *Re Kleinwort* [1951] Ch. 860, at p. 862.
(*n*) [1951] Ch. 860, at p. 863.

Bouch v. *Sproule* (*o*), and of the Privy Council in *Hill* v. *Permanent Trustee Co. of New South Wales* (*p*).

They may be summarised as follows:—

1. A distinction exists between the case where a company grants a bonus in the form of cash or in specie and the case where no part of the accumulated profits leaves the possession of the company but the bonus is the issue of new shares or debentures.
2. In the first case, as a limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital, any payment made by it by means of which it parts with moneys to its shareholders can only be made by way of dividing profits.
3. In this case, even if the company expressly terms the bonus a capital distribution the payments nevertheless remain a distribution of profits. Moneys so received by trustees will prima facie belong to the tenant for life.

In the second case referred to in (1) above, different considerations arise.

4. When a limited company with power to increase its capital applies a fund representing accumulated profits in paying up the amount of new shares which are issued and allotted proportionately to the shareholders, no part of the fund leaves the company's possession and its assets are undiminished. The fund which has been capable of division by the company as profits thereupon ceases for all time to be so divisible and becomes part of the capital of the company distributable to the shareholders only upon a reduction of capital or a winding-up. The fully paid shares so distributed must be dealt with by trustees as an accretion to capital.
5. The fact that in the case referred to in (4) above shareholders are given an option either to take up the new shares or to receive a proportionate sum of cash often causes difficulty in deciding whether the distribution is in the nature of capital or income. In each case the question is to be determined by the intention of the company, regard being had to substance and not to form. If, as in *Bouch* v. *Sproule* itself, the option is merely nominal,

(*o*) (1887) 12 App.Cas. 395.
(*p*) *Supra*, note (*g*). For a detailed discussion of these principles see Buckley's Companies Act, 12th ed., 896 *et seq*.

given for technical reasons, and the shareholders have no choice but to receive the bonus in the form of new shares, the distribution is capital (*q*). Different considerations apply if the option is not nominal, but real. A line of old authorities deals with this point, and is considered below.

C. *Re Malam and the exercise of a discretion by Trustees*

In *Re Malam* (*r*) the facts were as follows: A testator, who died in 1889, settled his residue upon trust for conversion and gave his trustees power to postpone conversion. The rule in *Howe* v. *Dartmouth* was excluded. At the time of his death, the testator was the registered holder of shares in a company with a capital of £1,500,000 divided into shares of £10 each. The company, by special resolution altering the articles (inter alia) (i) increased the nominal capital of the company to £2,000,000 by the creation of new shares, and (ii) empowered the directors to offer to preference and ordinary shareholders fully or partly paid shares "in payment of the whole or part of any dividend for the time being payable to the shareholders. . . ." (*s*). The report of the company showed a sum of some £300,000 distributable as dividend. The directors proposed to offer to allot to preference and ordinary shareholders a number of ordinary shares of value of £10, with £2 10s. per share paid up, to rank for dividend. Dividend warrants were to be issued to shareholders for one half of the dividend declared and the other half was to be applied in paying up the £2 10s. per share on the new issue. The circular in which the proposals were contained included an option to shareholders to receive the balance of their dividend in cash. The letter accompanying the allotment letter contained a statement by the chairman of the company that the company's shares were at a considerable premium and that the allotment letters had a value much greater than par. The trustees exercised their option to take up shares, but, treating them as the property of the tenant for life, renounced their rights in her favour and she accordingly received an allotment of new shares in the company. Stirling J. distinguished *Bouch* v. *Sproule* on the following grounds:

(i) The company had, in the instant case, assets not employed in the business amply sufficient to pay the whole dividend in cash.

(ii) The resolutions pointed to an increase of capital to the extent of £500,000, a sum greatly exceeding the dividend declared.

(*q*) (1887) 12 App.Cas. 385, *per* Lord Herschell at pp. 398–399.
(*r*) [1894] 3 Ch. 578.
(*s*) *ibid.* at p. 581.

(iii) The resolutions contemplated an offer of new capital to shareholders "in payment of" a dividend. He concluded therefore that it was not intended "to capitalise any existing assets of the company under the guise of first declaring a dividend and then issuing new shares . . ." (*t*). Unlike *Bouch* v. *Sproule*, therefore, the tenant for life was entitled to the declared dividend. She claimed, however, the allotted shares and, dealing with this claim, the learned judge said (*u*), "Those shares were not, however, in the first instance offered to her, but to the trustees. The option of determining whether the offer of those shares should be accepted or not lay with the trustees and not with the tenant for life. I apprehend that under the circumstances of the case it was their duty to accept the shares, and Lord Watson appears to have been of this opinion in *Bouch* v. *Sproule*. The question then is, on whose behalf is the option to be exercised? On behalf of the tenant for life, or of all the persons interested? If an offer were made to the trustees unconnected with the payment of any dividend, the option would have to be exercised on behalf of all the beneficiaries, and if the instrument creating the trust did not authorise the retention of shares, it would be the duty of the trustees to sell them and deal with the proceeds of the sale as capital . . . In the present case the dividend was declared and the option offered simultaneously; but still it seems to me that the principle . . . is applicable, and that the proceeds of the realisation of the shares should be applied in payment first of the dividends . . . and the balance ought to be applied as capital." The conclusion that capital must benefit from the taking up of the new shares was borne out by the fact that from the time the old shares were quoted ex dividend, including the option of new shares, there was, naturally, a considerable depreciation in their value. "Where new shares are allotted and paid for out of income, it must be remembered that any diminution in value of the old shares, consequent upon the issue of the new shares, is part of the consideration, and where new shares are allotted in lieu of dividend, the tenant for life is prima facie entitled as income to so much only of the value of the new shares as represents the dividend declared" (*a*).

The trustees in this case, therefore, were given a genuine option to accept a dividend in cash or in new shares. To have elected for the former would have resulted in an exclusive benefit for the tenant for life, and it was their duty to elect for the latter. The exercise of the option in this manner must not be said to have been for the

(*t*) At p. 586.
(*u*) At pp. 586 and 587.
(*a*) Lewin on Trusts, 15th ed., 241.

benefit of one class of beneficiaries only, but for the whole estate. The shares were an accretion to capital and the tenant for life was entitled to them only to the extent of the value of the dividend declared. Trustees, therefore, faced with the dilemma of two courses of action, either of which may benefit one class of beneficiary to the exclusion of another, must be deemed to have exercised their discretion on behalf of all the beneficiaries. If this is impossible, the court must exercise the discretion for them. It is submitted that, by analogy, trustees holding Thomas Tilling Stock and faced with the dilemma of either receiving British Transport Stock and thereby conferring an exclusive benefit on the tenant for life, or selling the Thomas Tilling Stock or the rights, and thereby exclusively benefiting remaindermen, should have sought the court's directions, and surrendered their discretion. This suggested principle is reinforced by the fact that if the trustees sell cum dividend, the court would, in the special circumstances, have little difficulty in directing an apportionment (*b*).

D. *Cases before and after Re Malam*

Two older cases, referred to by Stirling J. bear out the proposition advanced. It is clear from the facts of *Re Northage* (*c*) and from the judgment of North J. that trustees were there given a real option between a dividend in cash or new shares. They accepted new shares and, expressly without prejudice to the rights, if any, of the tenant for life, sold them at a price considerably in excess of the dividend. North J. held that the whole of the company's depreciation account had been declared as dividend with a provision by which the company anticipated that a good deal of it would remain in the company. On a sale of the shares, the tenant for life was entitled to the value of the dividend and no more. It is true that he waived his rights to any excess on sale, but the learned judge was careful to point out that he would have been entitled to no more than this in any circumstances.

Re Tindal (*d*) is briefly reported. The testator, who had settled his personalty, had died possessed of 600 fully paid £1 shares in the AB Company and these were transferred to the trustees of the will. The company passed a special resolution to the effect that shareholders should, to the extent of a sum of profits earned during the past year amounting to a dividend of 10 per cent., be treated as creditors of the company and should receive debenture certificates

(*b*) See *infra.*, para. E.
(*c*) (1891) 60 L.J.Ch. 488.
(*d*) (1893) 9 T.L.R. 24.

for the amounts so due. The shareholders would be entitled to an allotment of new fully paid shares at par in exchange for the nominal value of the certificates, or, if so required by the directors, be bound to accept the allotments. The market value of the new shares was two or three times their par value and the trustees accepted, and were allotted 60 shares in respect of their original holding of 600. The question was whether the additional shares were capital or income. Chitty J. held that the option exercised by the trustees must, according to the authorities and looking at the form and substance of the whole transaction, be deemed to have been exercised on behalf of the trust estate and for all the beneficiaries. That being so, the 60 new shares formed part of the capital of the trust estate. On the other hand, the tenant for life was entitled to the 10 per cent. annual earnings in exchange for which the shares had been allotted. He had, therefore, a lien on the shares for a sum of £60.

Here, therefore, the court directed an adjustment which held a balance between tenant for life and remaindermen, as a result of the exercise of the trustees' discretion, which might, but for the interference of the court, have resulted in an exclusive benefit to one class of beneficiaries. It is true that the tenant for life would have indirectly benefited by an accretion to capital in so far as he would have received the additional income on the new capital. The court, however, were prepared to confer a direct benefit but only to the value of the dividend, any excess being a capital gain.

Conversely, in *Re Evans* (*e*), Neville J. found on the evidence that the company intended to capitalise the reserve fund and not to distribute it by a bonus dividend, with the result that the rule in *Bouch* v. *Sproule* applied and the whole of the bonus dividend went to capital. Here, as in *Bouch* v. *Sproule*, the option was nominal and given for technical reasons. In such a case, the learned judge pointed out, trustees are on a different footing from ordinary shareholders. In effect, they have no option at all and they must take the greatest benefit. "Therefore, in the case of trustees, it seems to me that, although as between the company and them there may be a right to elect, between them and their *cestuis que trust* there is no such right, and they must take the dividend in what I will call the capitalised form. I hold, therefore, that in the present case the whole of the dividend must be treated as capital of the company" (*f*). Here, then, the trustees had no choice. There was no discretion to exercise and consequently no ground upon which to invoke the court's assistance to an apportionment.

(*e*) [1913] 1 Ch. 23.
(*f*) *ibid.* at p. 33.

These cases must, of course, be read in the light of the leading case of *Hill* v. *Permanent Trustee Co. of New South Wales* (*g*). Neither in that case nor in the cases following it has the principle of the *Re Malam* line of cases been invoked (*h*). The truth is that the alarming inequality of treatment has become apparent only in the Thomas Tilling Stock cases due to the enormous difference between the value of Tilling and Transport Stock. It is, nevertheless, difficult to dismiss *Re Malam* on the narrow ground of the distinction between a nominal and real option. This is an artificial distinction, but in the realm of capital and income most distinctions are artificial (*i*). Even where the option was real, the trustees were under a duty to choose the more beneficial course. Whether an option was real or apparent was important in deciding whether a company had capitalised its assets or not, under the rule in *Bouch* v. *Sproule*. But where the option was genuine, although the trustees can be said to have had no choice, in so far as it was their duty to pursue the more beneficial course, their discretion was important in deciding the question on whose behalf that course was followed. Here lies, it is submitted, the real *ratio* of these decisions, a *ratio* based on the much wider ground that trustees, faced with the invidious task of deciding whether to pursue a certain policy or not, must always be deemed to have elected for the benefit of all beneficiaries, and not only one class. It is immaterial that in the Thomas Tilling Stock cases, the trustees may never have considered that they were in an impossible position. Considered in the light of *Re Sechiari* it is clear that, at one stage, on receipt of the circular setting out the proposed transaction, they were confronted by an alternative which made it impossible for them to hold an even balance between their beneficiaries. It is submitted that, at that stage, it was their duty to seek the court's directions and, in so far as they did not do so, their beneficiaries must not suffer through a breach of that duty.

At first sight, *Re Thomas* (*k*) runs counter to these cases—trustees held settled shares in the Cambrian Colliery Company. Cambrian had invested a large reserve fund in the shares of a trust company and in fact held all the issued shares of that company. The trust company was a substantial shareholder in three other colliery companies. A combine company was incorporated for the

(*g*) [1930] A.C. 720, and see cases cited, note (*g*), *supra*.
(*h*) But see, *e.g.*, *Re Despard* (1901) 17 T.L.R. 478; *Re Hume-Nisbet* (1911) 27 T.L.R. 461.
(*i*) See, *e.g.*, *per* Lord Herschell in *Bouch* v. *Sproule* (1887) 12 App.Cas. 385 at p. 392.
(*k*) [1916] 1 Ch. 393; affirmed C.A. [1916] 2 Ch. 331.

purpose of acquiring the shares of the four colliery companies, including Cambrian, and the shareholders in these companies were given the opportunity of exchanging, on advantageous terms, their shares for shares in the combine. Practically all the shareholders, including the trustees, availed themselves of this offer. In the agreement dealing with the exchange, a note appeared to the effect that Cambrian's assets in the trust company would be distributed amongst the Cambrian ordinary shareholders, and it was intended that these assets should be distributed as undivided profits by way of dividend. The directors of the trust company exchanged all shares held by the trust company in the three other colliery companies for shares in the combine, and the trust company went into liquidation. Other steps were taken and a resolution was passed by Cambrian for distribution of its assets in the liquidation of the trust company, representing the reserve fund, amongst the ordinary shareholders. As a result of these transactions the trustees received shares in the combine and cash, and the question was whether these shares and cash were held as capital or income of the trust. Sargant J. held that the shares and cash were income in the hands of the trustees. Counsel for remaindermen, although not attacking the exercise of the trustees' discretion, submitted that "the trustees could not alter rights by concurring in the scheme" (*l*), and the learned judge, in the course of the argument, referred to *Re Malam*. The point was expressly taken in the judgment (*m*): "If the trustees . . . had been unwise enough not to come into the scheme, it seems to me indisputable that while continuing to retain their original holding of shares in the Cambrian Company they would have received, entirely independently of any change in the capital held by them and as by way of distribution of dividend pure and simple, the very shares with regard to which the question now arises (*n*). And that being so, I cannot think that the fact that they have made a beneficial exchange increasing the value of their capital holding can have the effect of causing an additional capitalisation of what would otherwise have been a distribution by way of dividend." The decision of Sargant J. was affirmed by the Court of Appeal (*o*), Lord Cozens-Hardy M.R. dealing at length with the position of the trustees (*p*). "While nothing was done, no doubt it (*q*) greatly increased the cash value in the market of these shares.

(*l*) At p. 391.
(*m*) At p. 394.
(*n*) A proposition doubted by Lord Cozens-Hardy M.R. in the C.A. [1916] 2 Ch. 331, at p. 342.
(*o*) [1916] 2 Ch. 331.
(*p*) At pp. 340, 341.
(*q*) *i.e.*, the proposed scheme.

But what was the position of the reserve fund? I think it is quite clear that the collieries company (*r*) . . . might have declared a dividend and divided this fund as a fund applicable to meet that dividend; in other words, they might have put into the pocket of the tenant for life . . . the whole or some part as they thought fit of the accumulated reserve fund, invested as it was. It was an inherent danger in the investment." Although the learned Master of the Rolls used expressions which might be read as negativing any duty on trustees in such a case, it is apparent from the facts that the trustees, by entering into the scheme, in fact benefited both tenant for life and remaindermen. Quite irrespective of the distribution of the reserve fund, as Sargant J. is careful to point out, a distinct benefit was conferred upon capital. There was no reason therefore for not applying the whole of the combine shares as income.

Lastly the case of *Re Smith's Will Trusts* (*s*) is important because an argument was put forward in that case which was in substance the same as that of counsel in *Re Kleinwort*, *supra*. A testator had settled his residue consisting partly of preference and ordinary shares in a company, which shares were held by the trustees of his will. The dividend on the preference shares was several years in arrears and the company, by means of a scheme sanctioned by the majority of shareholders and approved by the court, subdivided the ordinary £1 shares in the company into 3 shares of 6s. 8d. each, and allotted two thirds of the subdivided shares to the preference shareholders in consideration of a waiver by them of their claim to arrears of dividend. Farwell J. had held, in *Re MacIver's Settlement* (*t*), on this very scheme, that trustees holding preference shares only in the company and who received an allotment of ordinary shares, held these shares as income, as representing the accumulated arrears of dividend on the preference shares. It was sought to distinguish that case on the ground that the trustees were holding also ordinary shares, which, as a result of the scheme were reduced from their nominal value of £1 to 6s. 8d. In so far, therefore, as the ordinary shares had been contributed to some extent by the persons interested in capital, it was for the court to apportion the shares received by the trustees so as to produce an equitable result between capital and income. The argument for the remaindermen proceeded on the following lines: If the scheme had depended upon the consent of the trustees they would have been obliged, in order to perform their

(*r*) *i.e.*, Cambrian.
(*s*) [1936] 2 All E.R. 1210.
(*t*) [1936] 1 Ch. 198.

duty of acting fairly between tenant for life and remaindermen, to have come to the court. If they had done that, the court would have approved the scheme subject to an adjustment between tenant for life and remaindermen. The reason why the trustees did not come to the court was that they were overborne by the majority of the shareholders, but the court was now able to do what it would have done if the trustees had asked for directions when the scheme was suggested. Farwell J. held the ordinary shares to be income in the hands of the trustees and refused to accept the argument of remaindermen. He decided (inter alia):—

(i) The scheme was one which the trustees could not have prevented being given effect to, because the other shareholding was sufficiently large to enable it to be passed and in fact it was passed and approved by the court.

(ii) The trustees had not come to the court for directions, and indeed it was difficult to see how the court could have assisted them. The scheme having been passed by the necessary majority and having been approved by the court, the court would have been compelled to say that the trustees were bound by it.

(iii) There was, in essence, no difference between this case and *Re MacIver's Settlement* (*u*). The shares in the hands of the trustees represented past dividends and prima facie belonged to the tenant for life.

(iv) If it was necessary to direct any scheme of apportionment or adjustment of rights, it was difficult to see on what principle this could proceed. All the ordinary shareholders, instead of having in front of them large dividends due for arrears on the preference shares, which completely prevented them receiving any dividend themselves, now had shares, free from that debt, which had consequently risen in value. It followed from that fact alone that there could be no apportionment, as there was, in effect, no real loss to capital.

It will be seen from the summary of the facts and judgment applicable that there was in reality no ground for apportionment both because a summons for directions by the trustees would have been abortive, and because there was a true balance kept between tenant for life and remaindermen. It does not prevent the adoption of the course suggested by counsel for the remaindermen in a case where a summons for directions would have been the proper action for the trustees to have taken.

(*u*) *Supra*.

E. *Apportionment on sales cum dividend*

The principle contended for in this article is borne out by the line of cases which deals with apportionment cum dividend. These cases were dealt with at length in the judgment of Harman J. in *Re Maclaren's Settlement Trusts* (*a*). The facts of this case were peculiar. Twelve days after the announcement to shareholders by Thomas Tilling Ltd. of the proposed distribution, trustees of a settlement, with wide powers of investment, proposed to the tenant for life that certain capital moneys be invested in Thomas Tilling Stock. The tenant for life agreed and the purchase was made. After the distribution, the trustees sold the Tilling Stock and the Transport Stock receiving in the aggregate less than the amount of capital moneys originally invested in Tilling Stock. The proceeds of sale and other capital moneys were applied in the purchase of a residence for the tenant for life. The tenant for life, relying upon the decision in *Re Sechiari, supra*, claimed an equitable charge on the house or the proceeds of sale of an amount equivalent to the proceeds of sale of the British Transport Stock. The learned judge concluded that there were two questions before him: (1) whether, in the circumstances of the case, the tenant for life could make good his claim, and (2) whether a court of equity, in executing a trust, had an overriding jurisdiction in pursuance of its duty of holding the balance fairly between capital and income to prevent a result which, on the face of it, seemed to work an injustice to the remaindermen even if this involved treating income as capital. He answered the first question against the tenant for life on the following grounds: (a) that he had acquiesced in the purchase of the Thomas Tilling Stock as a capital investment; (b) that the tenant for life had agreed that the real object of this purchase was to acquire the British Transport Stock at a discount; (c) that, when the stock was sold, he had consented to its sale on the footing that it was capital; (d) that the purchase price was applied in the purchase of a house on the same footing.

The tenant for life had no claim, not because he was estopped, but because the transaction was in substance a purchase, with the tenant for life's consent, of British Transport Stock as a capital investment.

On the second question, Harman J. subjected to a close analysis a large number of decisions, of which *Bulkely* v. *Stephens* (*b*) can

(*a*) [1951] 2 All E.R. 414.
(*b*) [1896] 2 Ch. 241, and see especially *Re Winterstoke* [1938] Ch. 158; *Re Firth* [1938] Ch. 517; *Re Henderson* [1940] Ch. 368.

be said to be the leading case. His conclusions, on these cases, were as follows (*c*):—

"The court can, then, in special circumstances apportion between capital and income on sales or purchase of stock cum dividend or ex dividend, although it is not the practice to do so in the ordinary way because the various persons interested under settlements ought to take the rough with the smooth, and in order to ease the burden falling on trustees. The jurisdiction, however, exercised in special circumstances seems to be only the exercise of a right to make a more exact distinction of income from capital. As a matter of convenience, the practice is in the ordinary case that no apportionments are made, with the result that capital sometimes gets what, on a more exact scrutiny, would prove to be income and vice versa. Where this produces a glaring injustice, the court will cause a more exact calculation to be made, but it does not treat as income that which is capital, or as capital that which is income."

It must be emphasised that the rule that no apportionment is made is one based on convenience, for in the majority of cases it may be impossible to work out a proper apportionment. If trustees had sold the Thomas Tilling shares cum dividend before distribution, it is difficult to see how the court could fail to accede to an application by the tenant for life for an apportionment. *Re Sechiari* and its companion cases could well be said, one way or another, to produce a "glaring injustice," and apportionment would not be a matter of great difficulty. It is not easy to see why beneficiaries should be in a worse position when trustees, in exercise of a discretion to postpone conversion or to retain, have received a "capital profits dividend" in specie. This discretion, it has been argued, puts the trustees in the impossible position of being unable to keep the balance between tenant for life and remaindermen. It is, again, not easy to see a better mode of apportionment than that suggested by counsel in *Re Kleinwort*, *i.e.*, on the basis of a sale of half the stock and a retention of half. This, at least, achieves the happy position of equality, and "equality is equity" (*d*).

(*c*) [1951] 2 All E.R. 414, at p. 420.

(*d*) A maxim which has received consistent approval by the courts, either in terms, or by implication, in decisions covering a wide area of topics. For recent examples:—

Re Diplock [1948] Ch. C.A. (volunteer receiving moneys from fiduciary agent and mixing with his own shares *pari passu* with true owner), discussing *Sinclair* v. *Brougham* [1914] A.C. 398.

Re Jeeves [1948] Ch. 49, and *Re Birkett* [1950] Ch. 330 (distribution *per stirpes* or *per capita*).

Re Alexander [1948] 2 All E.R. 111 (existence of one article of jewellery available to meet two bequests).

Re Perowne [1951] Ch. 785 (where principles applicable to trust-powers are discussed).

[*continued over*

F. *Trustees' power to postpone sale*

Another way of stating the suggested proposition is that trustees with a discretionary power to postpone sale or to retain investments must exercise this discretion continually. A statement of this principle is to be found in the case of *Re Roth* (*e*) cited by counsel for remaindermen in *Re Rudd* (*f*). The point was taken in the latter case in the attempt to establish a breach of trust, and the submission was to the effect that the trustees should have met to decide whether to continue to exercise the power to postpone sale and, in failing to do so, committed a breach of trust. In dealing with this contention Upjohn J. said (*g*): "In my judgment, the trustees were not entitled to treat the Company's stock as permanent authorised investments. That, however, in my judgment, does not mean that the trustees ought necessarily to have taken the opportunity of realising the stock in order to make a large profit for capital at the expense of income, *as they must always act impartially between the two* (*h*). In my judgment, it is not sufficient to show that the trustees ought to have met and considered a sale or that they misunderstood the legal effect of the circular. It is further necessary to show, that being properly advised on the law, they ought to have sold the whole or some part of the Company's stock cum dividend. Except for the large sums involved, no reason was advanced to me why trustees should have sold the stock cum dividend, nor why, accepting the expression that the distribution was a windfall, it was wrong to allow the law to take its course with the result that the windfall belongs to income." It is respectfully submitted that the reason is inherent in the accepted rule that trustees must always act impartially between capital and income, a reason which lies behind the necessity for a continual exercise of discretion. The fault lies either in not applying this rule retrospectively to circumstances which, at the time, made its application impossible without the assistance of the court, or in not holding that the failure of trustees to consider the position constitutes a breach of trust. It seems remarkable that the courts, anxious in a wide field of cases

Jones v. *Maynard* [1951] 1 All E.R. 802 (husband and wife, joint account, *per* Vaisey J. at p. 804. "Plato said that equality was a sort of justice; that is to say, if in such a matter as this one cannot find any other basis, equality is the proper basis.")

Re North [1952] 1 All E.R. 609 (condition in will indicating tenancy in common).

Re Keele [1952] Ch. 306 (portions and jointure rent charge ranking *pari passu*).

(*e*) [1896] 74 L.T. 50.

(*f*) [1952] 1 All E.R. 254.

(*g*) At p. 260.

(*h*) Italics supplied.

to apply the maxim " equality is equity " (*i*), should demand the necessity of a breach of trust, in the face of the glaring inequality of the Thomas Tilling Stock cases.

G. *Exclusion of the rule in Howe* v. *Dartmouth in wills*

The question whether trustees have exercised this discretion to postpone sale or to retain is again important in considering the clauses in wills excluding the rule in *Howe* v. *Dartmouth*. It is clear that none of the trustees in the Thomas Tilling Stock cases considered the question of sale at the date the Company's circular was received, or, indeed, at any time before distribution. In so far as the alternative of sale or retention was never reviewed, it is difficult to say that the trustees did not sell in pursuance of a valid exercise of a discretionary power to postpone conversion. The reason for not selling was that it never occurred to them that they should nor did they think that the Transport Stock would be anything but a capital gain. A clause in a will excluding the rule in *Howe* v. *Dartmouth* is only operative if trustees in proper exercise of a power, determine to postpone sale (*k*). In the leading case of *Rowlls* v. *Bebb* (*l*) the Court of Appeal decided that trustees had not in fact exercised a discretion to retain or to realise a reversionary interest, forming part of the testator's estate. The court also concluded, having regard to the considerations described in evidence, that it would not have been proper for the trustees to have exercised their discretion in favour of retention (*m*). There it was held that the reversionary interest, notwithstanding a clause in the will excluding the rule in *Howe* v. *Dartmouth*, ought to be apportioned, when it fell into possession, as between tenant for life and remaindermen, in accordance with the principle in *Re Earl of Chesterfield's Trusts* (*n*) (a branch of the above rule). Lindley L.J. said in the course of his judgment (*o*): " I am satisfied that the question of converting . . . a reversionary interest . . . never crossed their minds, and it required the keen eyes of an equity lawyer to see that there was such a point. However, they did not see it, and they never thought of it. . . . It would not occur to ninety-nine men out of a hundred. . . ." No doubt ninety-nine trustees out of a hundred holding Tilling Stock would not consider the possibility of a " capital distribution " of Transport Stock being income in their hands,

(*i*) See *supra*, note (*d*), p. 35.
(*k*) See *Rowlls* v. *Bebb* [1900] 2 Ch. 107; *Re Hey's Settlement Trusts* [1945] Ch. 294, at p. 315; *Re Holliday* [1947] Ch. 402.
(*l*) [1900] 2 Ch. 107.
(*m*) The trustees were the residuary legatees.
(*n*) (1883) 24 Ch.D. 643.
(*o*) [1900] 2 Ch. 107, at p. 115.

although not subject to tax in the hands of the tenant for life (*p*). It is submitted that there is a strong argument for applying the rule in *Howe* v. *Dartmouth* in such a case, irrespective of its exclusion by a clause in the testator's will, as such a clause only becomes operative if the discretionary power to postpone sale has been validly exercised.

H. *Conclusions*

The conclusions to be drawn from the above cases can be summarised as follows:—

(1) Prima facie it is the paramount duty of trustees holding property upon trust for conversion in which persons are beneficially interested in succession to act impartially between their beneficiaries, and to hold an even hand between capital and income.

(2) It is a corollary of this duty that trustees holding property upon trust for conversion with power to postpone conversion should exercise their discretionary power of postponement continually.

(3) If the power to postpone conversion or to retain investments is ancillary to the trust for conversion, any clause expressly excluding the rule in *Howe* v. *Dartmouth* is only operative if trustees, in proper exercise of a power, determine to postpone conversion.

(4) In the Thomas Tilling Stock cases, the court should order an apportionment of the British Transport Stock—

(i) where, on construction of the will and on the facts, conclusion (3) above is inapplicable; or

(ii) on the ground that the trustees, in every case, were put in a position where it was impossible for them to carry out the duty, referred to in conclusion (1) above, and in so far as the directions of the court were not sought, the court should retrospectively adjust the balance.

(*p*) This seems clearly to follow from the revenue decisions, *e.g.*, *Gimson* v. *I. R. Commrs.* [1930] 2 K.B. 246; *Neuman* v. *I. R. Commrs.* [1934] A.C. 215.

THE CONCLUSIVENESS OF REGISTERED TITLES

By Theodore B. F. Ruoff, Solicitor

This article springs from some observations of Evershed M.R. in *City Permanent Building Society* v. *Miller and Another* [1952] 2 All E.R. 621, C.A. Without presuming to disagree in any particular with the decision of the Court of Appeal, or the *ratio decidendi* through which it was reached, the writer feels impelled to challenge, with the greatest respect, some *obiter dicta* of the Master of the Rolls in which he suggested that the Land Charges Act, 1925, may continue to affect the title of land after it has been registered under the Land Registration Act, 1925. Although the learned judge used words that reveal no hesitancy, the writer's challenge, though respectful, must necessarily be an unequivocal one on account of the principle involved.

It is, perhaps, desirable, for the sake of coherency, to remind the reader that in the case under discussion Miller was a rogue who, on receiving an ample sum in cash by way of rent in advance, purported to grant to an unfortunate widow named Cumberland a tenancy of unfurnished premises for three years and thereafter weekly. Miller then had no interest in the property, the title of which was registered at H.M. Land Registry, but later, a transfer in favour of Miller, and a charge by him to the plaintiff building society, were duly registered. The society was told nothing about the agreement with Mrs. Cumberland and she went into occupation a few days after the date of registration and there remained without paying rent. Miller afterwards went to gaol and the society eventually sought possession of the registered land.

The Court of Appeal decided two things. First, it held that the agreement did not create a legal term. Secondly, it held that Mrs. Cumberland's right to specific performance of the contract to grant a tenancy was not an overriding interest within the meaning of section 70 (1) (k) of the Land Registration Act, 1925, that is to say, an interest subject to which any registered disposition would take effect although no reference to the interest was made on the register (*ibid.*, s. 3 (xvi)). Consequently, the interest (not being protected on the register, and not being an overriding interest), was not one that took priority over the building society's charge and the society was entitled to possession of the land.

Having expressed these views, the Master of the Rolls went on

(at p. 625), to say: "It would, therefore, be surprising if, in the case of registered land, the registered proprietor found that the legal estate was subject to an equitable right of this kind, . . . and it would be particularly so when the other party to the contract was not, at the time of the contract, the registered proprietor and, *therefore, the party claiming could in no circumstances have had any notice or caution entered on the register.*" If, in fact, a claimant in such a case were to be debarred from entering notice or cautioning, a registered owner would indeed, as his lordship suggested, be worse off than an unregistered owner.

The Master of the Rolls then quoted from two statutes. The Land Charges Act, 1925, s. 23 (1), provides that "as respects . . . land charges (not including local land charges) required to be registered or re-registered after commencement of this Act, this Act shall not apply thereto, if and so far as they affect registered land, and can be protected under the Land Registration Act, 1925, by lodging or registering a . . . restriction, caution, inhibition or . . . notice." The complementary provisions of the Land Registration Act, 1925, s. 59 (2) (which are, perhaps, applicable to *Miller's Case* rather than those of subsection (1) quoted in the report, though his lordship undoubtedly read both), state that "Registration of a land charge (other than a local land charge) shall, where the land affected is registered, be effected only by registering under this Act a notice, caution, or other prescribed entry." No other such entry has yet been prescribed but it is possible that a restriction, or even an inhibition, might properly be used in exceptional circumstances. Notices and cautions are the devices that are commonly used.

The learned judge then said (at p. 626), "That" [meaning, presumably, the joint effect of the sections quoted], "makes it quite clear that, if there is a contract which could, and should, be registered as a land charge in the case of unregistered land pursuant to the provisions of the Land Charges Act, 1925, then there is a corresponding provision in the Land Registration Act, 1925, which entitles the person claiming under it to register a caution or notice. If it is not so capable of protection under the Land Registration Act, it continues to be covered by the Land Charges Act. In other words, *it is quite plain that the Land Charges Act is not wholly excluded* quoad *registered land.*"

These statements appear, firstly, to assume that, by reason of a lacuna in the Land Registration Act, there is a divergence of principle at this point between registered and unregistered conveyancing. Secondly, they suggest that under the Land Registration Act, a person claiming an interest, such as an estate contract

affecting registered property, has not got any machinery at his command to enable him to notify all persons who may be or become interested in the land which is the subject of his claim, in the same way, or to the same extent, as a claimant is able to give notice to the world under the Land Charges Act, in relation to unregistered land. Thirdly,—and here the result is little short of disastrous—it follows from the plain statement that the two Acts do not exclude the operation of one another (except, of course, in regard to local land charges), that every proposing purchaser mortgagee or lessee of registered property ought to search under the Land Charges Act as well as under the Land Registration Act. This is a practice which the legislature can never have intended to countenance, for it would inevitably undermine registered conveyancing by depriving it of that certainty and conclusiveness which are its fundamental characteristics.

In order to test and, if possible, to refute these three implications, the position of an ordinary sub-purchaser (who is not necessarily or usually in the same shoes as the unfortunate Mrs. Cumberland was) may first be examined. At the time he enters into the agreement to buy, his vendor (the original purchaser), has not got the legal estate and, if the subject-matter of the contract is unregistered land, it may be asked whether he can register notice of his equitable interest under the Land Charges Act. And here let it be said that there is nothing in the mechanism of that Act to prevent anyone from registering a fictitious estate contract against Sir Raymond Evershed himself at any time, although it would be a manifestly improper thing to do. It is necessary to remember that the Registrar's duties under the Land Charges Act are purely ministerial and that the system depends for correct and effectual working upon both the knowledge and the integrity of solicitors. Being human, they occasionally err, with the result (as those who regularly make official searches at Kidbrooke may observe for themselves) that entries creep on to the registers of matters which are not capable of registration or which should not be made in the names of the persons against whom they are entered. Therefore, one must ask: can the sub-purchaser *properly* register a land charge? The answer is that he may. The definition of an estate contract embraces "any contract . . . by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate" (Land Charges Act, 1925, s. 10 (1), class C (iv)). But, since a land charge is required to be registered in the name of the estate owner whose estate is intended to be affected (*ibid.*, s. 10 (2)), it would be not only irregular, but

quite ineffectual also, for the sub-purchaser to register a land charge against his immediate vendor (*cf.* Law of Property Act, 1925, s. 198 (2)). He must, of course, apply for registration against the original vendor, who owns the legal estate, and the fact that no privity of contract exists between them is quite immaterial.

Next, consider the position of the sub-purchaser of registered land. In this instance (and this is a minor benefit amongst many great advantages that registered conveyancing possesses), an irregular registration is, humanly speaking, unlikely to be made, for the duties of the Chief Land Registrar are not, in this instance, purely those of a recording agent. He will not allow the registration of anything which ought not to be entered on the title. If, then, the sub-purchaser, with or without the help of the purchaser, can induce the original vendor to consent, by lodging his land certificate at the Land Registry, he may apply for the entry of notice of his sub-contract (Land Registration Act, 1925, ss. 49 (1) (c); 64 (1) (c)). Failing that if, in a statutory declaration that is prescribed by rules, he can show a prima facie chain of connection between the registered proprietor (the original vendor) and himself, he is entitled to protect his equitable interest by caution (*ibid.*, s. 54), and, if his right to do so is challenged, he can have his claim judicially examined by the Chief Land Registrar or, on appeal, by the High Court (*ibid.*, ss. 55, 56). Cautions of this kind are actually registered from time to time. It is, therefore, abundantly clear that in the case of an estate contract affecting registered land there are provisions to enable claimants to protect their rights which correspond to those existing under the Land Charges Act. To that extent that Act is, in practice, wholly excluded *quoad* registered land.

But it seems that some capricious quirk in the language used in the two sections quoted earlier led the learned judge into believing that the provisions touching registered property were not entirely co-extensive with those governing unregistered property. Nevertheless, if it could be demonstrated that the register of title is conclusive as to all incumbrances, interests, rights and claims (other than overriding interests) adversely affecting a title, would it not then be fair to say that the dictum complained of becomes untenable?

Section 5 of the Land Registration Act, 1925, describes the effect of first registration with an absolute title of freehold land belonging to a beneficial owner. It declares that the act of registration "shall vest in the person so registered an estate in fee simple in possession in the land . . . subject to the following rights

and interests, that is to say, (a) subject to the incumbrances, and other entries, if any, appearing on the register; and (b) unless the contrary is expressed on the register, subject to such overriding interests, if any, as affect the registered land . . . *but free from all other estates and interests whatsoever*, including estates and interests of His Majesty." From this wording it is clear that the first registered proprietor takes free from every kind of interest or claim that is not actually disclosed on the register of title except, of course, those interests which, although common to both registered and unregistered conveyancing, are only specially put into a group and named as overriding under the former system. In fact, they are defects of title that are not normally disclosed in the abstract of title in general conveyancing but which are ascertainable, for the most part, by means of inquiries, searches and inspection of the property. They are similarly discoverable in registered conveyancing.

That is the case of the beneficial owner of freehold. Where the first proprietor is a fiduciary owner he will hold the fee simple subject as described above, and also " subject, as between himself and the persons entitled to minor interests, to any minor interests of such persons of which he has notice," but otherwise free as before (*ibid.*). Minor interests are equitable interests that are defined, *ibid.*, s. 3 (xv). Where, as happens but rarely, the title granted on first registration is a possessory or a qualified one, there is no guarantee that the estate may not be subject to estates, rights and interests derogatory to that of the proprietor (*ibid.*, ss. 6, 7), but obviously the owner of such a title knows that it is liable to be challenged or upset. Where registered land, of which the title is absolute, is sold for valuable consideration, provisions that are parallel to those of section 5, ensure that the purchaser will acquire the fee simple free from all estates and interests that are not disclosed on the register, or are not overriding interests (*ibid.*, s. 20 (1)). A disposition without valuable consideration takes effect subject to minor interests (*ibid.*, s. 20 (4)).

There are many other situations the effects of which are described in the Act in detail, such as those arising in relation to leaseholds, or in regard to other dispositions than a sale. But enough has been said to demonstrate that the register of title kept at the Land Registry is a mirror which gives both an accurate and a complete reflection of the material facts of a man's entitlement to land, and which gives, particularly, a complete picture of the burdens (other than the common overriding interests) affecting it. If, through human frailty, a flaw is detected in the mirror of title,

anyone who suffers loss thereby will be put in the same position, so far as money can do it, as if the reflection were a true one unless, of course, he himself has been fraudulent (*ibid.*, s. 83).

Some of the provisions that regulate the relationship of a vendor and purchaser of registered property serve to clinch the writer's argument. A vendor is obliged to supply his purchaser with copies of the subsisting entries in the register, and of any documents that have been noted on the register without being set out therein in full (*ibid.*, s. 110 (1)). This duty can most conveniently be discharged by his giving the purchaser photo copies which may be obtained speedily and cheaply from the Registry. Unless the parties make a special bargain to the contrary, the vendor must also give his purchaser full particulars and evidence of all subsisting overriding interests, being matters excepted from the effect of registration and as to which the register itself is not conclusive (*ibid.*, s. 110 (2)). Armed with these documentary evidences and with the vendor's authority to inspect the register, the purchaser's solicitor then makes an official search of the title (under the Rules of 1930 and 1936), which will ensure that before he goes to completion, he will have a predetermined and absolutely conclusive picture of the state of the title as it will be when, after completion of the purchase, he comes to lodge the transfer in favour of his client for registration. Furthermore, the accuracy of the official reply to the search is backed by the insurance fund (*ibid.*, s. 83 (3)).

It is unnecessary for the purchaser's solicitor to search at Kidbrooke under the Land Charges Act for any purpose whatever and, even supposing that he does so and that he finds some entry, it will not operate as notice prejudicially affecting his client. The reason is that section 110 (7) of the Land Registration Act categorically states that the purchaser shall not, by reason of the registration, be affected with notice of any pending action, writ, order, deed of arrangement or land charge (other than a local land charge) that is required to be registered under the Land Charges Act or any similar enactment, which can be protected under the Land Registration Act by means of a creditors' notice, restriction, inhibition, caution or other notice. "The purchaser shall not . . . be concerned to make any search therefor if and so far as they affect registered land." Finally, from section 59 (6) it appears that (subject to exceptions that are not material to the present discussion), ". . . a purchaser acquiring title under a registered disposition, shall not be concerned with any pending action, writ, order, deed of arrangement, or other document matter or claim (not being an overriding interest), which is not protected by a caution or other

entry on the register, whether he has or has not notice thereof, express, implied, or constructive." It is submitted that these plain statements in the Act can only mean that the Land Charges Act is excluded *quoad* registered property except, of course, as regards local land charges.

That this should be so is entirely reasonable and satisfactory, because adequate arrangements have been made for protecting on the register of title at the Land Registry every instrument or matter that can properly be registered at Kidbrooke. Thus a pending action affecting registered land, a writ or order for enforcing a judgment, and a deed of arrangement affecting registered land may be protected by caution under section 54 of the Act, and bankruptcy proceedings are, on the Registrar's own motion, protected by a creditors' notice and a bankruptcy inhibition under section 61 (1), (3). Restrictive covenants are protectable by notice under section 50, a charge for death duties, by notice under section 73 (7), and the equivalent of a puisne mortgage, by substantive registration under section 26. The remaining seven types of land charges may be protected in a variety of ways. Notice is the best method where there is no element of contention, for a caution is a hostile proceeding and may lead to a claim for damages if it is used without reasonable cause. But unless an instrument or matter of any of the kinds mentioned above is protected by some means on the register of title, the registered proprietor, or anyone who purchases his estate in an absolute title for value, may ignore it. So far as any such person is concerned the Land Charges Act, 1925 (except that part of it which deals with local land charges), might not exist.

TRUSTS FOR NON-CHARITABLE PURPOSES

By L. A. Sheridan, Barrister-at-Law

Testators have all sorts of bright ideas for the destiny of their belongings, and transactions *inter vivos* have also been known to raise tricky legal problems. So long as donors can be persuaded to give their property outright to persons or well-established charities, all will be well. Distributors of largesse, however, generally give because they want to, and not because giving can be accomplished with legal ease. So there are from time to time people who give property away, not *to someone*, but *to get something done*. If that something is not in law a charitable purpose—and only the bravest would care to prophesy whether a particular purpose will be held charitable—care has to be taken to ensure that the proper procedure is followed, and even then failure may ensue. It is reminiscent of the forms of action. Recent litigation has emphasised the importance of the procedure, and it is proposed here to survey the two questions of (1) how to make a gift for the attainment of a non-charitable purpose, and (2) the position of the trustee where the machinery turns out to have gone wrong.

I. VALIDITY OF GIFTS FOR NON-CHARITABLE PURPOSES

A. Trust and Obligation

Many attempts have been made to state in summary fashion the gist of a trust. These efforts have steadily improved, so rendering it adequate to consider only a couple of the modern ones. Maitland, acknowledging the vagueness, and going on to make detailed comments, said (*a*): "I should define a trust in some such way as the following—When a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose he is said to have those rights in trust for that other or for that purpose and he is called a trustee." Maitland's definition, which included the notion of being bound, was the forerunner of that propounded by Underhill,

(*a*) Equity, revised by Brunyate (1936), p. 44. To much the same effect are Warren, "The Progress of the Law, 1919–1920: Estates and Future Interests" (1921) 34 Harvard L.R. 639, and Lewin, Practical Treatise on the Law of Truste, 15th ed., by Horne (1950), pp. 100–101.

generally accepted (*b*) nowadays as a working basis: "A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trusts*), of whom he may himself be one, and any one of whom may enforce the obligation" (*c*). Keeton (*d*) rightly points out that this definition does not include charitable trusts (often known as public trusts), but it must be remembered that Underhill's book is on private trusts, and the author may well have replied that he could no more be criticised for this omission than could a writer on tort whose definition of nuisance did not cover public nuisance. Keeton (*e*) also points out, again rightly, that Underhill's definition does not cover non-charitable purpose trusts. Underhill may be blamed for a fault in this connection, because he did include (*f*) in his book a section on non-charitable purpose trusts—without doubting that they were trusts—while, if his definition is right, they are not trusts, comprehending no obligation. This is the view of Hart (*g*), who said that they were not trusts "in the ordinary sense in which the term is used by lawyers." He put them in a separate category, which he called "trusts of imperfect obligation" (*h*), and excluded them from his definition of trust. The argument is that for a trust there must be the ingredients of at least a trustee and a beneficiary, an obligation owed by the trustee to the beneficiary, and a right on the part of the beneficiary to come into court and have that obligation enforced: an unenforceable trust in this view is a contradiction in terms, being no more a legal possibility than a married spinster. Where the beneficiary is a human being or a corporation, the ingredients are right for the brew; where the trust is public, procedural difficulties are abrogated by the provision of public enforcing machinery; but where the gift is for the achievement of a non-charitable purpose, such as the undertaking of an annual dinner for the contributors to this Journal, there is no beneficiary, no obligation, no possibility of enforcement, and therefore no trust or trustee (unless resulting). Difficulties also arise with regard to discretionary trusts and revocable trusts, but these require separate treatment.

(*b*) See, *e.g.*, Halsbury's Statutes of England, 2nd ed., title "Trusts and Trustees," Vol. 26, p. 3.
(*c*) Law Relating to Private Trusts and Trustees, 8th ed. (1926), p. 3.
(*d*) The Law of Trusts, 5th ed. (1950), p. 3.
(*e*) *Loc. cit.*
(*f*) *Op. cit.*, pp. 78–79.
(*g*) "What is a Trust?" (1899), 15 L.Q.R. 294, 302.
(*h*) Other terms are "unenforceable trust" and "honorary trust."

B. Beneficiaries and Purposes

The anti-unenforceable trust faction bases itself upon *Morice* v. *Bishop of Durham* (*i*). In that case, property was left to the defendant "to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham . . . shall most approve of." This having been held not charitable, Grant M.R. said (*k*): "Every other trust must have a definite object. There must be somebody, in whose favour the court can decree performance." This is apparently the *ratio decidendi*, and the Bishop of Durham was adjudged to hold on trust for the next-of-kin. Yet the same result could have been achieved if the Master of the Rolls had said: "Every non-charitable trust must have a definite object. 'Benevolence and liberality' do not sufficiently define the class of objects from which the bishop is to choose." The decree of the Master of the Rolls was affirmed on appeal, where (*l*) Lord Eldon remarked that the effect of the gift was just as if the testator had left his property "on trust" without any further indication of his intention, which would be true whichever diagnosis the Master of the Rolls had preferred. The text writers have been at loggerheads as to the proper interpretation. Hart (*m*), though denying that a non-charitable purpose trust was a trust in the usual sense of the word, admitted that a disposition "on trust for" some such purpose was not necessarily devoid of all validity. J. C. Gray (*n*) thought the whole transaction abortive: he said that there could not be a legal interest without a beneficial one (*o*): no beneficiary, no trust, and that was that. He supported his view by reference to the revocable nature of an assignment to trustees to pay debts (yet his argument that non-charitable purpose trusts are revocable and that the right to revoke devolves on death ignores the limitation that a trust for creditors can be revoked only by the debtor). Sweet (*p*) regarded Gray's as "the true faith." But the learned editor of Gray's great work on The Rule Against

(*i*) (1804) 9 Ves. 399. See also: *James* v. *Allen* (1817) 3 Mer. 17; *Vezey* v. *Jamson* (1822) 1 S. & St. 69; *Ommaney* v. *Butcher* (1823) T. & R. 260; *Fowler* v. *Garlike* (1830) 1 Russ. & M. 232; *Williams* v. *Kershaw* (1835) 5 Cl. & F. 111; *Ellis* v. *Selby* (1836) 1 My. & Cr. 286; *Buckle* v. *Bristow* (1864) 11 L.T. 265; *Harris* v. *Du Pasquier* (1872) 26 L.T. 689; *Re Jarman's Estate* (1878) 8 Ch.D. 584; *Re MacDuff* [1896] 2 Ch. 451; *Grimond* v. *Grimond* [1905] A.C. 124; *Bowman* v. *Secular Society, Ltd.* [1917] A.C. 406, 441, *per* Lord Parker of Waddington; *Stewart* v. *Green* (1871) Ir.R. 5 Eq. 470; *Boyle* v. *Boyle* (1877) Ir.R. 11 Eq. 433.

(*k*) 9 Ves. 405.

(*l*) (1805) 10 Ves. 522, 527.

(*m*) *Loc. cit.*

(*n*) "Gifts for a Non-charitable Purpose," (1902) 15 Harvard L.R. 509.

(*o*) *Cf. Bank Voor Handel en Scheepvaart* v. *Slatford* (*No. 2*) [1952] 2 T.L.R. 861, 869, *per* Evershed M.R.

(*p*) "Restraints on Alienation" (1917) 33 L.Q.R. 342, 361.

Perpetuities (*q*) has so far departed from orthodoxy as to lower the true faith to the status of a general rule to which exceptions are no longer regarded as heretical. Keeton (*r*) thinks that *Morice* v. *Bishop of Durham*, *ante*, merely decided that the purposes enumerated by that testator were too uncertain. Hanbury (*s*) regards the case as dealing with the limits of legal charity.

The differences of opinion in the cases are no less. Leaving aside for the moment those numerous cases in which non-charitable purpose trusts have been upheld, there is still variation in the cases as to the effect of *Morice* v. *Bishop of Durham*, *ante*. It has already been remarked that Grant M.R. would have achieved the same result in that case had he held the purpose failed either because there is no such thing as a private purpose trust or because though there can be private purpose trusts these particular purposes were too vaguely delineated (*t*). The result is still the same if the purpose fails for perpetuity or impossibility : in all cases the lucky beneficiary of a resulting trust scoops the kitty. Unfortunately judges are not always clear in stating why they are holding a purpose to be a failure. In *Thomson* v. *Shakespear* (*u*), for example, there was a gift on trust for "forming a museum at Shakespeare's House, in Stratford, and for such other purposes as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to my wishes." The Court of Appeal in Chancery all held this void, the Lord Chancellor and Knight Bruce L.J. giving different reasons, and Turner L.J. agreeing with both of them ! Lord Campbell attributed the voidness to uncertainty and perpetuity, while Knight Bruce L.J. rested it on uncertainty and impossibility. In *Re Barnett* (*a*), where there was a legacy to a society for an annual dinner, Parker J. evidently thought that a purpose trust must be void (as he held this example) once its non-charitable nature had been established (though perpetuity would have been a sufficient ground). In *Re Wood* (*b*), after holding the particular purposes before him uncertain, Harman J. said (*c*) that there could not be a trust without a *cestui que trust*. But *Morice* v. *Bishop of Durham*, *ante*, had to wait 148

(*q*) 4th ed., 1942, by R. Gray, p. 767.
(*r*) *Op. cit.*, pp. 122–123. And see Nathan's Equity Through the Cases, 2nd ed., 1951, by Marshall, pp. 220–221.
(*s*) Modern Equity, 6th ed., 1952, pp. 213–215.
(*t*) *Cf. Re Douglas* (1887) 35 Ch.D. 472.
(*u*) (1860) 1 De G.F. & J. 399.
(*a*) (1908) 24 T.L.R. 788. *Cf. Re Charlesworth* (1910) 101 L.T. 908; *Re Coxen* [1948] Ch. 747.
(*b*) [1949] Ch. 498.
(*c*) [1949] Ch. 501, 502.

years before any judge based his decision on an exhaustive examination of the ground that "There must be somebody, in whose favour the court can decree performance." That was Roxburgh J. in *Re Astor's Settlement Trusts* (*d*). The purposes there were uncertain, but that was a secondary consideration : they were possible, and there was no question of perpetuity, but they were not charitable. They were held void. Equitable rights under a trust, it was said, had been hammered out in litigation between beneficiary and trustee; therefore there could be no trust without a correlative right. Besides, there was a practical objection to large funds being in the hands of trustees whom no one could control. Yet exceptions were admitted. Gray has been vindicated, and the true faith has been proclaimed anew, but the rights of minorities have been preserved, even if disparaged as anomalous. It is now time to consider the non-charitable purpose trusts which have been upheld.

(i) *Tombs and Monuments.* There is no doubt that a gift for the erection of a monument or tombstone is valid. It would seem from *Masters* v. *Masters* (*e*) that at one time legacies for that purpose were favourably regarded, as that type of legacy was there held not liable to abate with those to individuals. The following gifts have been held valid : a devise on trust to erect a monument to the testator's memory (*Mellick* v. *President and Guardians of the Asylum*) (*f*); a bequest on trust to erect such monument as the trustees thought fit (*Adnam* v. *Cole* (*g*), where the validity seems rather to have been assumed); a gift to erect a monument to the testator's wife's first husband (*Mussett* v. *Bingle*) (*h*); a gift of income to keep up and decorate a family burial enclosure (*Pirbright* v. *Salwey*) (*i*); and a bequest to executors and trustees for the care and upkeep of a vault and certain graves and monuments in any manner that they might in their discretion arrange (*Re Hooper*) (*k*). These are all decisions of first instance, but there is no higher, or even equal, authority to the contrary. They are all cases where there was no *cestui que trust*, however, and so it is necessary to consider their theoretical justification. Gray, in the *Harvard Law Review* (*l*), thought the only exception to the rule against trusts without beneficiaries consisted of the executor's

(*d*) [1952] Ch. 534.
(*e*) (1718) 1 P.Wms. 421. And see Tudor's Charitable Trusts, 4th ed., pp. 38–44, 502.
(*f*) (1821) Jac. 180.
(*g*) (1843) 6 Beav. 353.
(*h*) [1876] W.N. 170.
(*i*) [1896] W.N. 86.
(*k*) [1932] 1 Ch. 38.
(*l*) *Op. cit.*, *supra*, p. 48, note (*n*).

duty to pay funeral expenses. The tomb and monument cases, though, cannot be regarded as an extension of the funeral expenses principle, even if monuments to other people are ignored. The duty to pay funeral expenses is a requisite of decency : the executor may retain funeral expenses even if the will is silent on the subject, even if the estate is thereby rendered insolvent (*m*), and even if the deceased was bankrupt (*n*). Somebody is bound to dispose of the body anyway. The validity of a trust to erect and/or maintain a tomb or monument is an acquiescence in ostentation or piety : no one is bound to do it unless the testator directs it, and it certainly cannot be done so as to defeat creditors. In The Rule Against Perpetuities (*o*), Gray divides non-charitable purpose trusts into three classes, of which the third is the one now under discussion. He says: "With these last may be classified gifts for religious or memorial services for the dead (where these are not held to be charitable purposes), and a few cases of gifts for miscellaneous non-charitable purposes." All these, in his opinion, should be invalid dispositions for the lack of a *cestui que trust*. In *Re Astor's Settlement Trusts* (*p*), Roxburgh J. regarded the tomb cases as anomalous and exceptional.

(ii) *Identified Animals.* A gift by will on trust to maintain the testator's horses and hounds (*Re Dean*) (*q*) and a bequest for the support of dogs (*Re Kelly*) (*r*) have been held valid. Gray (*s*) would not have admitted the validity of these dispositions, but such cases do not appear to have occurred in the United States. North J., in *Re Dean* (*t*), evidently thought the tomb cases part of a general principle, and that there was no rule against trusts without beneficiaries, for he said (in holding valid a gift for animals) : "Then it is said, that there is no *cestui que trust* who can enforce the trust, and that the court will not recognise a trust unless it is capable of being enforced by someone. I do not assent to that view. There is not the least doubt that a man may, if he pleases, give a legacy to trustees, upon trust to apply it in erecting a monument to himself, either in a church or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid, although it is difficult to see who would be the *cestui que trust* of the monument. In the same way I know

(*m*) *Re M'Myn* (1886) 33 Ch.D. 575.
(*n*) *Re Walter* [1929] 1 Ch. 647.
(*o*) pp. 769, 777–779.
(*p*) [1952] Ch. 534, 547.
(*q*) (1889) 41 Ch.D. 552.
(*r*) [1932] I.R. 255.
(*s*) *Op. cit., supra*, p. 48, note (*n*).
(*t*) (1889) 41 Ch.D. 552, 556–557.

of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument. In my opinion such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal." Roxburgh J., in *Re Astor's Settlement Trusts* (*u*), thought this an exceptional class of trust. He said that the horses, dogs, graves, and monuments cases, which he subsumed under the head of "matters arising under wills and intimately connected with the deceased," were probably concessions to human weakness, and justified no larger principle.

(iii) *Non-charitable Religious Purposes.* Apart from the special class of case dealt with in paragraph (iv) of this section, the tombs and animals cases seem to be the only non-charitable purpose trusts upheld in England. In Ireland, the principle has been extended to cover certain religious purposes. A bequest for the saying of masses was held in *O'Hanlon* v. *Logue* (*a*) to be charitable, but before that decision such gifts were upheld (*b*) as non-charitable purpose trusts. There are still non-charitable religious purposes. In *Re Gibbons* (*c*), a testator gave his residue to his executors to dispose of it "to my best spiritual advantage, as conscience and sense of duty may direct." Barton J. held that this was a valid trust, although there was no *cestui que trust* who could enforce it, purporting to follow *Re Dean* (*d*), *Mellick* v. *President and Guardians of the Asylum* (*e*), and *Roche* v. *M'Dermott* (*f*).

(iv) *Enforceable Unenforceable Trusts.* In *Pettingall* v. *Pettingall* (*g*), £50 a year was bequeathed to an executor for the maintenance of a favourite black mare. It was held that £50 a year for the life of the mare was payable to the executor, and he was to use it for the animal's maintenance. If the mare was not duly maintained, any of the residuary legatees was at liberty to apply to the court. This would provide an indirect enforceability for the trust : if a residuary legatee made a successful application,

(*u*) [1952] Ch. 534, 543–544, 547.
(*a*) [1906] 1 Ir.R. 247.
(*b*) In *Phelan* v. *Slattery* (1887) 19 L.R.Ir. 177; *Bradshaw* v. *Jackman* (1887) 21 L.R.Ir. 12; *Reichenbach* v. *Quin* (1888) 21 L.R.Ir. 138; *Armstrong* v. *Reeves* (1890) 25 L.R.Ir. 325.
(*c*) [1917] 1 Ir.R. 448. And see *Re Ryan's Will Trusts* (1925) 60 Ir.L.T.R. 57; *Re Byrne* [1935] Ir.R. 782; *Re Keogh's Estate* [1945] Ir. R. 13.
(*d*) (1889) 41 Ch.D. 552.
(*e*) (1821) Jac. 180.
(*f*) [1901] 1 Ir.R. 394.
(*g*) (1842) 11 L.J.Ch. 176. *Cf. Gott* v. *Nairne* (1876) 3 Ch.D. 278.

the executor would lose the entire annuity, which he would not want to do, as, under the particular will, he was entitled beneficially to any surplus left each year after providing adequately for the mare. The only subsequent application of this procedure has been to an entirely different purpose, in *Re Thompson* (*h*), where a bequest was made to be applied in such manner as the legatee should in his absolute discretion think fit towards the promotion and furtherance of fox-hunting. This was held by Clauson J., who reserved to the residuary legatees liberty to apply, a valid disposition. Roxburgh J., in *Re Astor's Settlement Trusts* (*i*), points out that *Pettingall* v. *Pettingall* (*k*) was not a case of trust, but of a legacy, whose validity was anyway not contested. These remarks, however, do not dispose of *Re Thompson* (*l*).

C. Purposes and Perpetuities

All the cases, English (*m*), Irish (*n*), and from elsewhere (*o*), concur in holding that a non-charitable purpose trust is void if it is to last longer than the perpetuity period. This is also the view of all the text writers (*p*). The rule has been applied rigorously to all types of purposes, whether for the upkeep of graves, tombs, vaults, or monuments (*q*), for the care of animals (*r*), for the maintenance of a masonic temple (*s*), or a museum (*t*), or portrait (*u*), for private educational purposes (*a*), for the supply of an annual cup for yacht racing (*b*), or, as in *Yeap Cheah Neo* v. *Ong Cheng Neo* (*c*), where there were gifts (1) to turn a building into a family

(*h*) [1934] Ch. 342.
(*i*) [1952] Ch. 534, 542–543.
(*k*) (1842) 11 L.J.Ch. 176.
(*l*) [1934] Ch. 342.
(*m*) *Re Dean* (1889) 41 Ch.D. 552; *Re Good* [1905] 2 Ch. 60; *Re Drummond* [1914] 2 Ch. 90; *Re Topham* [1938] 1 All E.R. 181; *Re Coxen* [1948] Ch. 747. And see Tudor, *op. cit.*, pp. 54, 130–136.
(*n*) *Dillon* v. *Reilly* (1875) 10 Ir.R.Eq. 152; *Beresford* v. *Jervis* (1877) 11 Ir.L.T.R. 128; *M'Court* v. *Burnett* (1877) 11 Ir.L.T.R. 130; *Kehoe* v. *Wilson* (1880) 7 L.R.Ir. 10; *Morrow* v. *M'Conville* (1883) 11 L.R.Ir. 236; *Small* v. *Torley* (1890) 25 L.R.Ir. 388; *Laverty* v. *Laverty* [1907] 1 Ir.R. 9; *Re Kelly* [1932] Ir.R. 255.
(*o*) *Kennedy* v. *Kennedy* [1914] A.C. 215.
(*p*) See, *e.g.*, Maitland, *op. cit.*, p. 52; Underhill, *op. cit.*, p. 78; Gray, The Rule Against Perpetuities, pp. 769–779; Keeton, *op. cit.*, p. 120; Nathan, *op. cit.*, pp. 218–220.
(*q*) See *Rickard* v. *Robson* (1862) 31 Beav. 244; *Fowler* v. *Fowler* (1864) 33 Beav. 616; *Hoare* v. *Osborne* (1866) L.R. 1 Eq. 585; *Mussett* v. *Bingle* [1876] W.N. 170; *Re Vaughan* (1886) 33 Ch.D. 187; *Re Jones* (1898) 79 L.T. 154; *Toole* v. *Hamilton* [1901] 1 Ir.R. 383; *Re Barker* (1909) 25 T.L.R. 753.
(*r*) *Re Kelly* [1932] Ir.R. 255.
(*s*) *Re Porter* [1925] Ch. 746.
(*t*) *Thomson* v. *Shakespear* (1860) 1 De G.F. & J. 399.
(*u*) *Re Gassiot* (1901) 17 T.L.R. 216.
(*a*) *Re Compton* [1946] 1 All E.R. 117.
(*b*) *Re Nottage* [1895] 2 Ch. 649.
(*c*) (1875) L.R. 6 P.C. 381.

house and so to keep it; (2) of land to be always used as a family burying place; and (3) of a house to be used solely for the performance of religious ceremonies to the memory of the testatrix and her husband.

A testator who leaves income for the repair of a tomb for 21 years makes a valid gift, while one who places no such time limit fails to give at all. It is hazarded as a safish speculation that most of the testators who purport to give indefinitely or for ever would prefer to have their purposes carried out for the perpetuity period rather than have them collapse altogether. Clauson J., in *Re Topham* (*d*), one of the latter class of case, said : " I may perhaps be permitted to say—though I do not suppose it is of any consolation to anybody—that I do feel, in coming to that decision, that I am setting at nought the perfectly plain intention of the testator." These are words of regret, not of exultation. To defeat the intention of the testator is one of the recognised and vital functions of equity judges, but a rule of equity which does so capriciously is garbage. There is no apparent reason why at least an *indefinite* (if not a purportedly *perpetual*) purpose trust should not be upheld for the perpetuity period and no longer. After all, a testator only wants to do what the law allows : the idea of a testator setting out to draw elaborate dispositions with the intention that they shall infringe rules of law and be held void is grotesque. Yet equity apparently draws a distinction between a testator who wants to do what the law allows and one who says so in his will (the validity of the literal approach to deeds is not here impeached). In *Pirbright* v. *Salwey* (*e*), there was a gift of income to keep up and decorate a family burial enclosure " so long as the law for the time being permitted." The case was decided by Stirling J. and the report states : " *Held*, that the gift was valid for at least a period of 21 years from the testator's death, and *semble* that it was not charitable." This decision is virtually valueless as authority : first, it is vital to know whether the gift was charitable or not; secondly, if it was valid for 21 years at least, how long was it valid at most? Maugham J., however, in *Re Hooper* (*f*), managed to follow *Pirbright* v. *Salwey*—at least, that was the reason he gave for his decision. In that case there was a bequest to executors and trustees " so far as they legally can do so and in any manner that they may in their discretion arrange " for the care and upkeep of a vault and certain graves and monuments. This

(*d*) [1938] 1 All E.R. 181, 185.
(*e*) [1896] W.N. 86.
(*f*) [1932] 1 Ch. 38. *Cf. Re Beresford Hope* [1917] 1 Ch. 287; *Portman* v. *Viscount Portman* [1922] A.C. 473.

was upheld for the period of 21 years. If the testator does not make the contrary clear, why not assume he wanted things done only so far as they could legally be done? This seems less tortuous than the ingenious route followed by Meredith J. in *Re Kelly* (*g*). The testator there had said : " I leave one hundred pounds sterling to my executors and trustees for the purpose of expending four pounds sterling on the support of each of my dogs per year, and I direct that my dogs be kept in the old house at Upper Tullaroan aforesaid. Should any balance remain in the hands of my trustees on the death of the last of my dogs I leave same to the Parish Priest for the time being of the Parish of Tullaroan for masses for the repose of my soul and the souls of my parents, brothers and stepfather." The learned judge held that, so far as the primary gift was concerned, there was a separate bequest for each of the years during which the dogs lived, and that the first 21 of those bequests were valid.

Roxburgh J., in *Re Astor's Settlement Trusts* (*h*), regarded the cases on gifts to unincorporated societies as irrelevant to the problem before him, but, as they are usually considered in connection with non-charitable purpose trusts and as Nathan (*i*) brings them into his analysis of purposes and perpetuities, a brief outline of them is undertaken here. The principles were summarised by Byrne J. in *Re Clarke* (*k*), where he said : " It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, will the legacy when paid be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good. So also if the gift is to be construed as a gift to or for the benefit of the individual members of the association. On the other hand, if it appears that the legacy is one which by the terms of the gift, or which by reason of the constitution of the association in whose favour it is made, tends to a perpetuity, the gift is bad."

Thus, first, if the society can at any time dispose of the capital as they please, the gift is good : there is no trust. In *Cocks* v. *Manners* (*l*), property was left by will to " the Dominican convent at Carisbrook," a society of Roman Catholic women living together by mutual consent. Wickens V.-C. held the donation valid. This decision was followed by the Irish Court of Appeal in *Re Wilkinson's*

(*g*) [1932] Ir.R. 255.
(*h*) [1952] Ch. 534, 546.
(*i*) *Op. cit.*, p. 219.
(*k*) [1901] 2 Ch. 110, 114. And see Gray, The Rule Against Perpetuities, pp. 769–775.
(*l*) (1871) L.R. 12 Eq. 574.

Trusts (*m*), where there was a bequest to the "Superioress of the Convent of Mercy at K., to and for the purposes solely of the said convent, or to such other person as may be superioress of said convent at my decease." The principle is clear, and has been often applied (*n*), and was approved by the House of Lords (*o*), but sometimes the construction placed upon the donor's words by the court has been unexpected. In *Re Turkington* (*p*), for example, the testator left the residue of his estate "to the Staffordshire Masonic Lodge, No. 726, as a fund to build a suitable temple in Stafford." Luxmoore J. upheld this gift, saying that the lodge could do as they pleased with the fund: there was no trust for its use, merely an indication of the testator's preference.

Secondly, if the gift is to the members of a society beneficially it is valid. There is nothing to stop a testator making a gift to individuals, designating them otherwise than *nominatim*. Once again, however, constructions are not always usual (or words too perspicuous). In *Re Delany's Estate* (*q*), there were two gifts by will to the Bishop of Cork (1) "in trust for the Sisters of Mercy at Bantry"; (2) "to be applied by him for the benefit of the Convent of Mercy at Bantry." The Irish Court of Appeal held that these were gifts beneficially to the individuals who constituted the society on the date of the testator's death.

Thirdly, if the gift is merely of income on trust for the purposes of a society, and that trust is not to determine within the perpetuity period, the trust is void (*r*). If the trust is to last for that period or less, it is apparently a valid non-charitable purpose trust (*s*).

Now the big question remains, how does the rule against perpetuities come to operate on the duration of non-charitable purpose trusts? The rule is normally against remoteness of vesting in interest, and it is by no means apparent how it comes to require non-charitable purpose trusts to end within the span of a life or lives in being and 21 years thereafter from their commencement. Three views have been put forward in answer, which may

(*m*) (1887) 19 L.R.Ir. 531.

(*n*) In *Re Drummond* [1914] 2 Ch. 90; *Re Prevost* [1930] 2 Ch. 383; *Re Turkington* [1937] 4 All E.R. 501; *Re Price* [1943] Ch. 422.

(*o*) *Macaulay* v. *O'Donnell* [1943] Ch. 435.

(*p*) [1937] 4 All E.R. 501.

(*q*) (1882) 9 L.R.Ir. 226. And see *Bradshaw* v. *Jackman* (1887) 21 L.R.Ir. 12.

(*r*) *Carne* v. *Long* (1860) 2 De G.F. & J. 75; *Re Dutton* (1878) 4 Ex.D. 54; *Re Amos* [1891] 3 Ch. 159; *Re Swain* (1908) 99 L.T. 604; *Re Barnett* (1908) 24 T.L.R. 788; *Re Clifford* (1911) 106 L.T. 14; *Re Patten* [1929] 2 Ch. 276; *Re Jones* (1929) 45 T.L.R. 259; *Re Clark's Trust* (1875) 1 Ch.D. 497; *Macaulay* v. *O'Donnell* [1943] Ch. 435; *Re Wightwick's Will Trusts* [1950] Ch. 260.

(*s*) That is the view expressed by Gray, The Rule Against Perpetuities, pp. 769–775.

be termed the inalienability explanation, the limited duration explanation, and the power explanation.

(i) *The Inalienability Explanation.* Gray, in his *Harvard Law Review* article (*t*), puts forward the opinion that there are two perpetuity rules: the ordinary one, and that limiting the duration of non-charitable purpose trusts. The ordinary rule against perpetuities has no relevance to the duration of anything. The other limited one, the duration kind, has grown up as the result of confusion between remoteness (of vesting—which does not affect the question because no amount of time will allow property to become vested in a purpose) and inalienability. If there is no beneficiary there can in consequence be no alienation. Gray, of course, regarded the absence of a beneficiary as fatal anyway, but thought the courts had mistakenly paid attention to the consequence, and had confused that with remoteness of vesting, so producing a special rule, allowing inalienability in special cases for the period during which in other spheres vesting is not too remote. Sweet (*u*) agreed with Gray; Nathan (*a*) differed, but only to the extent of saying that it is now (which is true in the light of the decisions) a question of duration and not of inalienability. One argument of Nathan's, however, requires comment. He says (*b*): "It is therefore, it is submitted, a question of duration, not of inalienability. A trust to pay the income to a club, and a trust to utilise the income for the maintenance of a tomb, are trusts which are both void on the same ground, *viz.*, as perpetual non-charitable trusts. If the test were inalienability, then since a club can assign its beneficial interest, while a tomb cannot, the one trust would be valid and the other one void; which is not the law." But isn't it? One would think from *Re Clarke* (*c*) that it is. If there is a trust to pay the income in perpetuity to a club, and no restriction is placed upon the club's use of the money, the club can alienate its interest, and for that reason the trust is valid (*d*). A trust

(*t*) *Op. cit.*, *supra*, p. 48, note (*n*).
(*u*) *Op. cit.*, *supra*, p. 48, note (*p*).
(*a*) *Op. cit.*, pp. 218–219.
(*b*) *Op. cit.*, p. 219.
(*c*) See *ante*, p. 55.
(*d*) See, further, *Re Chardon* [1928] Ch. 464; *Re Chambers' Will Trusts* [1950] Ch. 267. The analysis is this: a trust for a club as such is a purpose trust and is void if to last longer than the perpetuity period because there is no beneficiary and therefore no possibility of alienation. But if, as a matter of construction, the gift is such that the members of the club can at any time dispose of the property the trust is valid. It is a question of alienability. A gift of income in perpetuity, if construed so as to give the members of the club for the time being power to dispose of the capital, is valid. See, further, Lloyd, Law relating to Unincorporated Associations, 1938, Part II, Chap. 4.

to utilise income in perpetuity for the purposes of a club is what Nathan must have had in mind as being void, and there the club cannot alienate as no beneficial interest vests in the members. And a tomb cannot alienate its beneficial interest, not because it is incapacitated or restrained from alienating, but because is has no beneficial interest : it is not a *cestui que trust*, but part of the trust property. The point is that there is no *cestui que trust* of the tomb.

There are undoubtedly two rules : first, a rule against remoteness of vesting. A contingent ownership of property must become vested in interest within the perpetuity period. Secondly, a rule against inalienability of vested interests. Restraints on alienation of present rights are not tolerated for a minute. Yet the rule against perpetuities aims to prevent inalienability, and allows it to some extent for a time, while with the species of inalienability resulting from a trust for the maintenance of a tomb the trust funds are being spent : owners of graveyards get their amenities improved, and the commerce of the land is quickened by the flow of money through the hands of stonemasons and monumental sculptors, architects, surveyors, and chisel manufacturers. There appears to be no inherent evil in permitting this kind of inalienability for 21 years.

(ii) *The Limited Duration Explanation.* Nathan (*e*), having rejected Gray's explanation, yet recognising that the ordinary rule against perpetuities is irrelevant, has to look for some other parentage to the rule limiting the duration of valid non-charitable purpose trusts. He discovers, astonishingly (*f*), that there is a general rule that all beneficial interests under a private trust must end within the perpetuity period counted from their commencement. It is, however, unnecessarily drastic, merely in order to reconcile the cases on non-charitable purpose trusts with tradition, to abolish equitable interests of inheritance, and to render illegal trusts in favour of corporations.

(iii) *The Power Explanation.* Smith (*g*) is the author of the view that there is only one perpetuity rule, and that non-charitable purpose trusts are real valid trusts, and in a way enforceable. The argument runs like this : Suppose a bequest of £1,000 to A on trust to maintain my tomb. The beneficial interest is undisposed

(*e*) *Op. cit.*, pp. 219–220.

(*f*) My astonishment has already been expressed in 9 Northern Ireland L.Q. 179.

(*g*) "Honorary Trusts and the Rule Against Perpetuities" (1930), 30 Columbia L.R. 60. And see Ames, "The Failure of the 'Tilden Trust'" (1892), 5 Harvard L.R. 389.

of, so there is a resulting trust. But the residuary legatee or next-of-kin (as the case may be) has an equitable title subject to the trustee's power of disposing of the income for the maintenance of the tomb. (This is similar to *Pettingall* v. *Pettingall*) (*h*). True, the trustee cannot be compelled to maintain the tomb, but nor can any donee be compelled to exercise a power of appointment. All powers of disposition of property must be exercisable only within the perpetuity period. The ordinary rule against perpetuities applies to powers of appointment, and that is why non-charitable purpose trusts cannot last longer than that, and are void if they possibly could.

This argument commended itself to the editor of Gray's The Rule Against Perpetuities (*i*), and lines up with *Pettingall* v. *Pettingall* (*k*) and *Re Thompson* (*l*). The one objection to it is that the courts have never considered it, let alone adopted it, all the time they have been achieving its result. Furthermore, its validity stops short at dispositions by will.

So far it has been assumed that the perpetuity period which constitutes the maximum duration of valid non-charitable purpose trusts is the same as that during which contingent future interests must vest. But *Re Dean* (*m*) has given rise to speculation as to whether it might not be permissible to use as lives in being those of non-human animals. Gray (*n*) poses the question, and Nathan (*o*) is inclined to an affirmative answer. That naturally evokes diverting contemplation of the value of the most longevous animals, and the potentialities of trusts for the lives of tortoises and parrots (though vegetables, which have been neglected, are even more exciting: what about a trust to last for the lives of all the trees now in Hyde Park and the lives of the survivors and survivor thereof and 21 years after the death of the last survivor?) The trouble about *Re Dean* (*p*) is that it was a trust for horses and hounds for 50 years if they so long lived. Now, if no life in being is selected, the perpetuity period is 21 years. This trust was upheld, so, presumably, the idle rich animals were the lives in being. That is the argument which impressed Gray (*q*) and Brunyate (*r*). But while that argument may be difficult to answer

(*h*) (1842) 11 L.J.Ch. 176. See *ante*, p. 52.
(*i*) pp. 779–785.
(*k*) See *ante*, p. 52.
(*l*) [1934] Ch. 342. See *ante*, p. 53.
(*m*) (1889) 41 Ch.D. 552. See *ante*, p. 51.
(*n*) *Op. cit.*, pp. 776–777.
(*o*) *Op. cit.*, p. 219.
(*p*) (1889) 41 Ch.D. 552.
(*q*) *Loc. cit.*, *supra*, p. 48, note (*n*).
(*r*) Maitland's Equity, p. 52n.

in the artificial terms in which perpetuities operate, it is quite obvious that a trust for horses and hounds in being does not stand the slightest chance of lasting longer than an average human life, and is very unlikely to last 21 years. Realism commended itself to Danckwerts J. in *Re Haines* (*s*), where he held valid a trust in a will for the maintenance of two cats. Judicial notice was taken of the shortness of a cat's life (*t*). Keeton (*u*) is satisfied that, in spite of *Re Dean* (*a*), only human lives are allowed, and this is in accordance with the scant authority. The point has been expressly considered in only one reported case, *Re Kelly* (*b*). The gift over to the Parish Priest of Tullaroan on the death of the last of the testator's dogs was held void for perpetuity, on the ground that a dog might live longer than the perpetuity period of 21 years. (Surely this would be a wondrous dog!) Meredith J. said (*c*): "'Lives' means human lives." And again (*d*): ". . . there can be no doubt that 'lives' means lives of human beings, not of animals or trees in California." An interesting case, which is little help on account of the paucity of the report, is *Re Howard* (*e*). During the course of his will, the testator provided: ". . . as to my two pet dogs and parrot it is my wish that they may be neither given away nor sold, and that my two servants Sarah Caseley and Martha Hunt may have the care of them during their lives and the life of the survivor of such my dogs and parrot and receive an annuity of £10 a year for their upkeep." At the time of the case, the dogs were already dead. Nevill J. held that there was a good gift of the annuity of £10 to Sarah Caseley and Martha Hunt during their lives and the survivor of them, if the parrot should so long live, upon trust to apply the annuity for the maintenance of the parrot. Assuming the report to be correct, this result was presumably achieved by these stages. The annuity is expressed to be given for the life of a parrot. A parrot's life will not do for the purpose of the perpetuity rule. The gift

(*s*) (1952) *The Times* Newspaper, November 7, p. 11.

(*t*) The reports runs:—

"His Lordship.—Is there any trouble with regard to the rule against perpetuities? How old are the cats?

"Counsel did not know.

"His Lordship.—Can I take judicial notice of the fact that 16 years is a long life for any cat?

"Counsel.—Yes, I think that you can.

"His Lordship accordingly held that the executors were entitled to provide for the maintenance of the two cats."

(*u*) *Op. cit.*, p. 123.

(*a*) (1889) 41 Ch.D. 552.

(*b*) [1932] Ir.R. 255. See *ante*, p. 55, for the facts.

(*c*) [1932] Ir.R. 260.

(*d*) [1932] Ir.R. 261.

(*e*) (1908) *The Times* Newspaper, October 30, p. 3.

therefore infringes the rule. However, it would be a valid gift if to last only as long as the annuitants. Therefore it will be upheld for their lives (if the parrot so long lives), *i.e.*, it was upheld for a less period than that indicated by the testator, although he used no such formula as " so far as can legally be done."

D. Validity of " The True Faith."

Re Astor's Settlement Trusts (*f*) differs from the earlier cases in being concerned with a settlement *inter vivos*. Shares were transferred to trustees to apply the income, for a certain period not infringing any perpetuity rule, to purposes which roughly boil down to the improvement of international relations, preservation of Press independence and integrity, conducting newspaper business, and assistance of newspaper personnel. At the end of the period, there was a gift over to the " younger of the two persons who shall at such end be respectively the Warden of All Souls College, Oxford, and the Master of Trinity College, Cambridge, or if the younger of them shall disclaim the benefit then for the other of them or if either office (of Warden or Master) shall be vacant at such end then for the person who shall hold the other office at such end." It was agreed that the trust was not charitable.

On the question of the validity of the primary gift, Roxburgh J. was impressed by the argument based on *Morice* v. *Bishop of Durham* (*g*) that for a trust to be valid there must be somebody in whose favour the court can decree performance. He dealt with the cases in which non-charitable purpose trusts had been upheld for the perpetuity period or less, and regarded them (except *Re Thompson* (*h*), the fox-hunting case) as exceptional in that they were all concerned with matters arising under wills and intimately connected with the deceased. The learned judge did not feel disposed to dissent from any of these decisions : he merely regarded them as exceptions to a general rule that there is no trust of which performance cannot be compelled. He also held the Astor trust void for uncertainty of objects. It is important now to discover just how far this general rule goes, and where the exceptions begin.

Among those who share the opinion of Roxburgh J., none seems ready to argue that evil would flow from upholding non-charitable purpose trusts, provided they were not to last too long and the trustee could be controlled. Sweet (*i*) even regards some of these purposes as commendable. The purpose itself may, of course, be

(*f*) [1952] Ch. 534.
(*g*) (1804) 9 Ves. 399.
(*h*) [1934] Ch. 342.
(*i*) *Op. cit.*, *supra*, p. 48, note (*p*).

objectionable, but that is not the point (*k*). A line could be drawn so as to prevent *Brown* v. *Burdett* (*l*) falling into the same category as *Re Astor's Settlement Trusts* (*m*). Assuming that particular purpose to be in no conflict with public policy, the argument is simply that it cannot be effectuated by trust. *Re Astor's Settlement Trusts* involved the construction and validity of a trust deed, and so presumably technical terms had to receive a technical meaning. The settlor purported to establish a " trust," and, as a trust could not be established, the court could not look for any other way of upholding the transaction. They could not, for example, construe the deed as creating a power of appointment (leaving aside, that is, the uncertainty question). But if the settlor's purposes had been described beyond reasonable doubt, all that this school holds is that there would still have been no trust. It may be possible to effect non-charitable purposes some other way.

When upholding gifts in wills for tombs, animals, and religious purposes, the courts have generally not concerned themselves with enforcement, or with what was to happen if the purpose was not properly accomplished. They did concern themselves with those questions in *Pettingall* v. *Pettingall* (*n*) and *Re Thompson* (*o*). These cases certainly seem to approximate closely to Smith's analysis (*p*). Wherever there is a non-charitable purpose " trust " in a will (Smith would say), the trustee cannot be compelled to carry out the purpose : he holds on a resulting trust, but can override the resulting beneficiary's interest by appointing income for the furtherance of the purpose, and the ordinary rule against perpetuities applies. It is true that this is to say that the trustee need not effectuate the purpose, but he cannot misapply funds. Moreover, that is a good deal better than telling a trustee who is willing to gratify the testator's wishes that he is not allowed to do so and must pay all over to the very person the testator wished to disinherit (*q*). And there is no doubt that a power to appoint for a non-charitable purpose would be valid. In *Re Douglas* (*r*), the testatrix left the residue of her pure personalty for division among such charities (including the " Society for the Protection of Animals liable to Vivisection " and " Home for Lost Dogs ") " and in such shares and proportions as the said Earl of

(*k*) *Cf.* Underhill, *op. cit.*, pp. 78–79.
(*l*) (1882) 21 Ch.D. 667.
(*m*) [1952] Ch. 534.
(*n*) (1842) 11 L.J.Ch. 176.
(*o*) [1934] Ch. 342.
(*p*) See *ante*, p. 58.
(*q*) *Cf.* Ames, *op. cit.*, *supra*, p. 58, note (*g*).
(*r*) (1887) 35 Ch.D. 472.

Shaftesbury shall by writing nominate . . ." The Court of Appeal held that, assuming the named organisations to be not charitable, the gift was nevertheless valid. Cotton L.J. said (*s*): "Then there are certain specified things which he may include in the distribution if he thinks fit. Does that come within the principle of *Morice* v. *Bishop of Durham*? In my opinion it does not. All that that case decided was this, that where there is no definite object pointed out as the object of the trust, then the court says that the trust cannot be executed, unless the court can itself determine how it is to be applied, which it can only do where the object is a charity. But if there are definite objects pointed out and a discretion is given to trustees to distribute property amongst those definite objects, in my opinion that judgment in no way decides that such a gift fails." If this view is right, all that *Re Astor's Settlement Trusts* (*t*) decides is that in that case the trustees could not have *power* to override the resulting beneficiary's interest because, in the deed, it was purported to *compel* them to do so.

This leads to two submissions: (1) In a will, a gift which is to be applied for a non-charitable purpose should be construed as a power to appoint the income in furtherance of the purpose. The power cannot be exercised outside the perpetuity period, else it is void. The purpose must not itself be contrary to public policy. At the end of each year, the resulting beneficiary can claim income not appointed. The resulting beneficiary is entitled in default of appointment, and the usual rules as to excessive execution and fraud on a power apply. Of course, the person entitled in default of appointment need not be the resulting beneficiary: he is when no one else is selected. The true construction of the will may be that the "trustee" is to keep what he does not appoint. (2) In order to ensure the validity of a gift for a non-charitable purpose in a deed or a will, it should be drafted as a power of appointment, with a gift over of the income in default of appointment unless it is desired that income not appointed should go as undisposed-of property (under a will). The power should preferably be drafted so as to be exercisable without writing, and so as not to be exercisable outside the perpetuity period. A power given to one person only is bound to comply with the rule against perpetuities. There is no difficulty as to gifts over when the power determines.

Admittedly, there is no way for a settlor to impose an obligation to carry out a non-charitable purpose (otherwise than by contract). But if he selects his donee with care, it should be of comfort to

(*s*) 35 Ch.D. 485.
(*t*) [1952] Ch. 534.

know that that donee will not be restrained from carrying out the purpose. Besides the power of appointment method, there are various other ways of imposing duties of honour to carry out non-charitable purposes. (1) An interest in property may be given to a person so long as he carries out the purpose (*u*). He cannot be compelled to carry out the purpose, but if at any time he fails to do so, the property will revert to the resulting beneficiary. This method has the advantage of being likely to ensure the effectuation of the purpose for much longer than the perpetuity period, but the disadvantages that more than is necessary for the purpose must obviously be given, and that there cannot be a gift over on ceasing to perform. (2) The latter disadvantage can be obviated by making the donee a charitable organisation, with a series of similar determinable interests in remainder to other charities (*a*). (3) Property may be given to a person on condition he carries out the purpose (condition subsequent) or on condition he gives an undertaking to carry it out (condition precedent). The condition is valid, in that its existence does not impugn the validity of the gift, but unenforceable, in that breach of it (if subsequent) or breach of the undertaking (if precedently given) will not determine the gift, or give anyone the right to determine it (*b*). This so-called " condition " is no more effective than a gift to some person coupled with a request to do something with it (or just a request to do something not with the property given). Careful wording is required, for if the condition makes the purpose a first charge on the gift, the whole transaction may fail for perpetuity or under the rule against non-charitable purpose trusts (*c*).

II. TRUSTEE OF AN INEFFECTUAL NON-CHARITABLE PURPOSE TRUST.

A. Where the True Position is Known at the Start

If there is an abortive attempt to create a non-charitable purpose trust (or any trust), the trustees—that is, assuming the attempt has been adequate to show an intention to set up a trust at all—hold on a resulting trust (*d*), which may be for the settlor or his residuary legatee or devisee or intestate successor. If, therefore,

(*u*) *Re Chardon* [1928] Ch. 464; *Re Chambers' Will Trusts* [1950] Ch. 267.
(*a*) *Re Tyler* [1891] 3 Ch. 252.
(*b*) *Lloyd* v. *Lloyd* (1852) 2 Sim.N.S. 255; *Roche* v. *M'Dermott* [1901] 1 Ir.R. 394; *Re Galway* [1944] N.I. 28; *Re Elliott* [1952] 1 All E.R. 145.
(*c*) *Brannigan* v. *Murphy* [1896] 1 Ir.R. 418; *Re Dalziel* [1943] Ch. 277.
(*d*) *Vezey* v. *Jamson* (1822) 1 S. & St. 69; *Ommaney* v. *Butcher* (1823) T. & R. 260; *Fowler* v. *Garlike* (1830) 1 Russ. & M. 232; *Williams* v. *Kershaw* (1835) 5 C. & F. 111; *Stubbs* v. *Sargon* (1838) 3 My. & Cr. 507; *Re Jarman's Estate* (1878) 8 Ch.D. 584.

property is vested in trustees for purposes which wholly fail, whether for perpetuity or otherwise, the trustees hold the whole for the resulting beneficiary. Difficulty arises, however, when there is a gift for purposes which partly fail (usually for perpetuity) and which are partly valid (usually as being charitable).

The legal consequences of that situation were thoroughly examined by Jenkins J. in *Re Coxen* (*e*), where he said : " The case is, therefore, said to be one of the type in which a fund or the income thereof is directed to be applied primarily to purposes which are not charitable and as to the balance or residue to purposes which are charitable. I was referred to a number of cases in which the effect of dispositions of this type has been considered, and the result of the authorities appears to be : (a) that where the amount applicable to the non-charitable purpose can be quantified the trusts fail *quoad* that amount but take effect in favour of the charitable purpose as regards the remainder; (b) that where the amount applicable to the non-charitable purpose cannot be quantified the trusts both charitable and non-charitable wholly fail because it cannot in such a case be held that any ascertainable part of the fund or the income thereof is devoted to charity; (c) that there is an exception to the general rule in what are commonly known as the " Tomb Cases " that is to say, cases in which there is a primary trust to apply the income of a fund in perpetuity in the repair of a tomb not in a church, followed by a charitable trust in terms extending only to the balance or residue of such income, the established rule in cases of this particular class being to ignore the invalid trust for the repair of the tomb and treat the whole income as devoted to the charitable purpose; and (d) that there is an exception of a more general character where as a matter of construction the gift to charity is a gift of the entire fund or income subject to the payments thereout required to give effect to the non-charitable purpose, in which case the amount set free by the failure of the non-charitable gift is caught by and passes under the charitable gift." There seems no reason to confine these principles to cases where the secondary gift is charitable : all that matters is that it is valid.

Jenkins J.'s proposition (a) is supported by various cases (*f*). In *Re Rigley's Trusts* (*g*), for example, Kindersley V.-C. said :

(*e*) [1948] Ch. 747, 751–752. And see Tudor, *op. cit.*, pp. 92–95, 147–148.

(*f*) *Att.-Gen.* v. *Whitchurch* (1796) 3 Ves. 141; *Mitford* v. *Reynolds* (1842) 1 Ph. 185; *Adnam* v. *Cole* (1843) 6 Beav. 353; *Magistrates of Dundee* v. *Morris* (1857) 3 Macq. 134; *Fisk* v. *Att.-Gen.* (1867) L.R. 4 Eq. 521; *Re Birkett* (1878) 9 Ch.D. 576; *Champney* v. *Davy* (1879) 11 Ch.D. 949; *Re Vaughan* (1886) 33 Ch.D. 187.

(*g*) (1867) 15 L.T. 499, 500.

"If the court can ascertain how much is required for one object and how much for another, it will then find in the proportions thus ascertained; but in doing so, the question as to what is the number of objects arises, and whether the case is such that the court sees, *a priori*, that it is utterly impossible to determine how much is wanted for each, in which case it will direct an inquiry." In *Re Coxen* (*h*), Jenkins J. suggested that if exact quantification were not possible, the court would ascertain the amount which no conceivable estimate could exceed, at any rate where that amount would be small in relation to the whole income or fund. This is supported by *Re Birkett* (*i*). In *Cramp* v. *Playfoot* (*k*), on the other hand, Page Wood V.-C. took the view that the court would not bother to try to quantify if it were obvious that the whole or practically the whole of the fund would be required for the primary purpose.

Ample authority (*l*) can also be found for proposition (b), notwithstanding that Malins V.-C., in an unreserved judgment (*m*), thought it overruled by *Fisk* v. *Att.-Gen.* (*n*). The Vice-Chancellor's decision could have been on ground (c) or (d), and would probably have to be today. The only other doubt thrown upon proposition (b) was by Kindersley V.-C. in *Hoare* v. *Osborne* (*o*), where he said: "The cases shew that where a single fund is given for several objects of this nature, and one of them is bad, the principle on which the court acts is, that if it can be ascertained what are the proper proportions to be attributed to the several objects, it directs an inquiry on the subject; but if, from the nature of the gift, it appears impracticable to fix the proportions, the court divides the fund equally between the different objects"; which was done in that case. But, with respect, where are the cases which show that? The Vice-Chancellor cited none, and no case put forward by counsel in argument decides it.

There are a few cases (*p*) which support rule (c) in *Re Coxen* (*q*). Apart from these, *Dawson* v. *Small* (*r*) (which was expressed by

(*h*) [1948] Ch. 747, 753.
(*i*) (1878) 9 Ch.D. 576, 578, 579.
(*k*) (1858) 4 K. & J. 479.
(*l*) *Att.-Gen.* v. *Goulding* (1788) 2 Bro.C.C. 428; *Chapman* v. *Brown* (1801) 6 Ves. 404; *Att.-Gen.* v. *Davies* (1804) 9 Ves. 535; *Limbrey* v. *Gurr* (1819) 6 Madd. 151; *Re Birkett* (1878) 9 Ch.D. 576; *Re Taylor* (1888) 58 L.T. 538; *Re Porter* [1925] Ch. 746.
(*m*) In *Re Williams* (1877) 5 Ch.D. 735.
(*n*) (1867) L.R. 4 Eq. 521.
(*o*) (1866) L.R. 1 Eq. 585, 588–589.
(*p*) *Hunter* v. *Bullock* (1872) L.R. 14 Eq. 45; *Re Birkett* (1878) 9 Ch.D. 576; *Re Vaughan* (1886) 33 Ch.D. 187; *Re Rogerson* [1901] 1 Ch. 715
(*q*) [1948] Ch. 747.
(*r*) (1874) L.R. 18 Eq. 114.

Bacon V.-C. to be decided on ground (d)) and *Re Williams* (*s*) (which was based by Malins V.-C. on a rejection of proposition (b)) could properly be brought under it. *Fowler* v. *Fowler* (*t*) alone is authority for the view that there is no such exception. There has never been any doubt as to the validity of the last [(d)] proposition (*u*).

B. Trust Administered in Ignorance.

(i) *Liability for the Past.* It may happen that trustees of a non-charitable purpose trust apply the funds to the purpose for some years only to discover later that the trust fails for perpetuity or some other ground not readily apparent to the person without a conveyancer's training. The trustees have then paid the wrong person in mistake for a beneficiary, and prima facie the trustees are liable to the resulting beneficiary (assuming that a trust has been created), at least in respect of the last six years (*a*). But the trustees may claim relief under section 61 of the Trustee Act, 1925, which empowers the court to exonerate from liability for breach of trust a trustee who has acted honestly and reasonably and who ought fairly to be excused. The courts have properly refused to declare rules as to what is reasonable or fairly to be excused, for such questions of fact ought not to be trammelled by precedents. Some guidance, however, can be obtained from the cases. For a start, the trustee may be relieved from liability notwithstanding that it arises from a mistake of law (*b*), and liability of the kind now under discussion is practically bound to result from what is usually regarded as a mistake of law. It is true that in *National Trustee Co. of Australasia, Ltd.* v. *General Finance Co. of Australasia, Ltd.* (*c*), a trustee honestly and reasonably paid the wrong beneficiary, and yet the Judicial Committee refused relief under the Victorian Trusts Act. But the trustee was paid for his services, and had made no effort to recover the money—two factors which tipped the scales against him. In *Re Allsop* (*d*), a private trustee was relieved (in the Court of Appeal) from liability for having honestly paid the wrong beneficiaries after taking legal advice. In *Holland* v. *German Property Administrator* (*e*), the

(*s*) (1877) 5 Ch.D. 735.
(*t*) (1864) 33 Beav. 616.
(*u*) *Fisk* v. *Att.-Gen.* (1867) L.R. 4 Eq. 521; *Re Rogerson* [1901] 1 Ch. 715; *Kelly* v. *Att.-Gen.* [1917] 1 Ir.R. 183. And see *Dawson* v. *Small* (1874) L.R. 18 Eq. 114; *Re Williams* (1877) 5 Ch.D. 735.
(*a*) See Limitation Act, 1939, s. 19.
(*b*) *Perrins* v. *Bellamy* [1899] 1 Ch. 797.
(*c*) [1905] A.C. 373. And see *Re Windsor Steam Coal Co.* (1901), *Ltd.* [1929] 1 Ch. 151.
(*d*) [1914] 1 Ch. 1.
(*e*) [1937] 2 All E.R. 807.

Court of Appeal applied the section even though no legal advice had been sought : it was reasonable not to have thought that the law might require a different disposition from that laid down in the trust instrument.

Apart from relief under section 61 of the Trustee Act, 1925, or section 19 of the Limitation Act, 1939, a trustee may be able to set up the concurrence of the beneficiary in the breach. Wherever a beneficiary of full capacity, and aware of all the facts—it is not necessary for him to know that the facts amount in law to a breach of trust—consents to the course taken by the trustee, that beneficiary has no cause of action if that course turns out to be a breach of trust (*f*). This defence would be particularly relevant where the trust was set up *inter vivos*, the resulting beneficiary therefore being the settlor.

If a trustee is held liable, he will normally be unable to recoup his losses from the person he wrongly paid. A volunteer is bound to replace what he has received (*g*), but the payee under a non-charitable purpose trust (such as the vendor of lights to trustees for the maintenance of cats) is likely to be a bona fide purchaser for value without notice. For the same reason, no remedy is likely to be available to the resulting beneficiary against the actual payee either *in personam* or *in rem* upon the *Re Diplock* (*h*) principles. The recipient may sometimes be a volunteer, as, for example, where there is a trust for the education of rich relations and money is paid to a rich relation's guardian (*i*).

So far reference has been made only to the plight of a resulting beneficiary under a private purpose trust which wholly fails. It is conceived that the situation is the same where the trust is partially bad, as to both (1) a resulting beneficiary entitled to a quantified share and (2) an express beneficiary entitled to the valid part.

(ii) *Adjustment for the Future.* By the time the resulting beneficiary discovers that the purpose trust is void, there may be nothing left of the trust property. Obviously there is then nothing to be done. Alternatively, only income may have been used, or where capital was to be spent it may not have been exhausted. In that case (*k*) the trust property, or what remains of it, must be held for the correct beneficiary. This must be so even if the character of the property has changed. Suppose several score people

(*f*) *Fletcher* v. *Collis* [1905] 2 Ch. 24.
(*g*) *Re Ainsworth* [1915] 2 Ch. 96.
(*h*) [1948] Ch. 465.
(*i*) In order to trace, of course, it is essential that the recipient still have the money or at least something representing it.
(*k*) Always assuming that on the true construction of the gift the "trustee" is not entitled beneficially.

have subscribed to a trust fund to run a newspaper on non-profit lines, and the trustees, having spent the money on premises and plant, have run the newspaper for twenty or thirty years. If it is then discovered that the purpose trust is void, the trustees hold the newspaper concern on trust for the subscribers (or their successors) in proportion to the subscriptions. This would presumably be a trust for sale (*l*)—it would have to be so far as the land was concerned—but would the beneficiaries be entitled to have the trustees change their non-profit-making policy pending sale? And how would the trustees trace all those entitled? The very existence of these difficult questions shows how unsuitable the trust mechanism is for such an undertaking : the best way to effect non-profit ventures of what would normally be a commercial character is by the flotation of a limited liability company. No doubt the original subscribers could not complain at the lack of income pending sale, as they have caused that state of affairs to exist, but there is no principle on which successors in title could be denied such income as a prudent trustee could squeeze out of the business. And as for finding the beneficiaries, it is hesitantly suggested that the trustees could avail themselves of the protection offered by the Trustee Act, 1925, s. 27.

This state of affairs has never yet come up in litigation : perhaps it never will. But it might. And if it does, there will not be much confidence as to the principles to be argued for. In seeking these principles it is difficult not to be torn between a clockwork actuation of rules and a rebellion against scooping bounty into the hands of those least intended to have it (possibly to the ruin of men honestly performing without reward a favour for the bountiful). Life would be made easier for draftsmen and safer for trustees if Parliament were to lay down the limits within which private purpose trusts would be upheld, and beyond which validity would be denied. The destination of property inadequately settled could be determined. Perhaps the *cy-près* doctrine might be imported. Resulting beneficiaries might be more often foiled in their attempts to make relatives *ex post facto* generous. This is not yet. In the meantime conveyancers may have to advise against projects which seem innocuous, even laudable, to ordinary men. But at least it is becoming clearer that some non-charitable purposes can be effected to a limited extent by certain modest methods. These are available to the cautious many : but may one of the irrepressible strong call some day upon the House of Lords !

(*l*) Application to the court for directions could scarcely be avoided in these awkward circumstances.

NOTES ON THE EJUSDEM GENERIS RULE

J. F. Mackeson, b.a.cantab., Solicitor

This rule is not referred to in the Interpretation Act, 1889, or in any other Statute. It is not a rule of law but is a rule of construction of great practical importance. Indeed it is probable that a high proportion of legal documents contain some form of words which may raise the question whether or not the rule applies. The first sentence of this article provides an instance. It raises no problem because it is clear that there is no intention to cut down the generality of the phrase " any other Statute." From the point of view of literary criticism—and the rule has been said to be a matter of literary criticism by that eminent judge, the late Lord Robertson in *Larsen* v. *Sylvester & Co.* [1908] A.C. 295, it might be said that to bring in the Interpretation Act is redundant. Indeed from a logical point of view it is mere surplusage. However, that Act is clearly the most likely Act in which to find a reference to the rule, if anywhere, so its actual naming in this way may be excused. To use too many, rather than too few, words is perhaps an occupational disease of the legal draftsman, even if we admit as lawyers that legal English is necessarily verbose, barbaric, inelegant and turgid, for which sad state of affairs Sir Ernest Gower's Plain Words gives a spirited apologia. Do we not, however, in drafting too often allow to stand a collection of items followed by general words without due consideration of the legal effect? It is sometimes a matter of practical difficulty to avoid a list of things followed by general words; the matter is urgent and the risk is taken.

The present article does no more than attempt to give an impression obtained from reading a considerable number of decided cases in which the rule has been applied or not as the case may be, or in some way commented upon. If reference is made to the rule in Halsbury's Laws of England or in the English and Empire Digest it will be seen that there are a great number of cases on the subject. At one time the writer hoped to prepare a tabular form giving the actual phrases construed by the courts but soon gave this up as impracticable owing to the great length and verbosity of some of the documents which have come before the courts. The following, therefore, may be looked upon as a general impression obtained from reading the cases with an attempt to refer to what appeared to be the more helpful references to the rule.

In the first place, it seems clear that the rule is only one instance of the more general rule of construction that a contract should be looked at as a whole in order to give effect to the intention of the parties. One clause may have an effect on another and in any sentence the various words react on one another. Indeed, the rule has been given as an example of *noscitur ab sociis*. The rule is similar to the rule that words, however general, may be limited with regard to the subject-matter in relation to which they are used (*per* Lord Halsbury in *Thomas and Mersey Marine Insurance Co.* v. *Hamilton Fraser & Co.* (1887 12 A.C. 484). The intention of the parties is the main thing. The rule is an admission of the fact that parties, with their minds concerned with the particular objects about which they are contracting, are apt to use words, phrases or clauses, which taken literally are wider than they intend: Devlin J. in his recent review of the rule in the case of *Chandris* v. *Isbrandtsen Moller Co. Inc.* [1950] 1 All E.R. 768 (which may be compared with the review made by McCardie J. just 30 years before in *Magnild* v. *McIntyre Bros.* [1920] 3 K.B. 321, overruled on another point [1921] 2 K.B. 97).

The particular form of the contract may be important as, for example, the standard printed form which is adapted for a particular purpose. It is only too easy to leave in the printed form something which is inconsistent with what is specially added. In such cases the latter will usually prevail even if it means rejecting words or even whole provisions inconsistent with the main purpose of the contract. Where, therefore, a bill of lading provided for a cargo of oranges to be shipped " in and upon the good ship *Zena* now lying in the port of Malaga and bound for Liverpool," the ship owner was not justified in allowing the ship to go out of her way to visit a port 350 miles from Malaga, so that the oranges were damaged by the consequent delay in reaching Liverpool, although the printed part of the bill of lading clearly allowed the deviation (*Glynn* v. *Margetson & Co.* [1893] A.C. 351). Again, where a suspension clause in a contract made before 1914 between a British firm and an Austrian firm for supply of iron-ore included a reference to " wars," McCardie J. was able to hold that " wars " did not include any war between the U.K. and Austria (*Naylor, Benzon & Co., Ltd.* v. *Krainische Industrie Gesellschaft* [1918] 1 K.B. 331).

Broadly speaking, no doubt, the same considerations apply whether the words under construction occur in a commercial contract, a lease, a will or a statute or regulation, but inevitably the approach will be different in the particular case. Where, for, example, a statute is under consideration there is no question of the intention of the parties, and it may make a difference whether

the statute is or is not a penal one. Again, in the case of wills special considerations and presumptions come into play, for example, the presumption against intestacy. In cases of contract or grant there may be presumptions that the document should be construed against the grantor or against the party putting it forward. Perhaps all this amounts to no more than the need to look at the particular instance in the light of all the available circumstances. As Lord Buckmaster said in the case of *The Stag Line, Ltd.* v. *Foscolo Mango & Co., Ltd.* (1932) 37 Com.Cas. 54, " to my mind it is impossible to frame a rule applicable to all the various documents in which such phrases are to be found. General words in a will following a specific instance may require different interpretation from that demanded by similar words in an Act of Parliament or a charterparty."

Attempts, too, have been made to make the rule completely logical. For instance, it is said that the main reason of the rule is that, if the general words are given their full or ordinary meaning, then the enumerated items are mere surplusage. However, Devlin J. points out in the *Chandris Case* that in commercial documents not prepared by lawyers the presumption against surplusage is of little value in deciding whether or not to apply the rule. Perhaps one of the most common statements occurring in a number of *dicta* throughout the cases is that it is necessary to be able to find a common class or genus before the rule can be applied. If no such genus can be found then the general words must be unlimited in meaning. An example may be taken from the recent case of *Coates* v. *Diment* [1951] 1 All E.R. 890 where there was power in a tenancy agreement to give notice to quit part of an agricultural holding for the purpose of " building sites or planting or other purposes." At first sight it is difficult to find any common genus between building sites and planting. It was argued for the landlord that if there is no common genus then the rule does not apply. The two enumerated items were surplusage and notice could be given for any purpose whatsoever. Streatfeild J. was not prepared to go to this length and he followed the opinion of Devlin J. in the *Chandris Case*, who said on this point, " If a genus cannot be found, doubtless that is one factor indicating that the parties did not intend to restrict the meaning of the words, but I do not take it to be universally true that, whenever a genus cannot be found, the words must have been intended to have their literal meaning, whatever other indications there may be to the contrary." He was not, therefore, prepared to find that the taking of half a dozen acres for a greyhound stadium and racing track within a quarter of a mile

of the farmhouse was within the intention of the parties when making the agreement.

However, the strict logical view was taken recently by the House of Lords in *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166, where the words to be construed were in a Statutory Order defining a workman as " any person who has entered into or works under a contract with an employer whether the contract be by way of manual labour, clerical work, or otherwise." It was held that the use of the words " or otherwise " did not bring into play the *Ejusdem Generis* principle because manual labour and clerical work do not belong to a single limited genus. The question was whether administrative and technical officers of a local authority were included. Lord Porter, however, pointed out that there was a section in the parent Act providing that it was not to apply to persons in the armed forces, and that this emphasised the broadness of the definition. Again, it has been argued that two or more words are essential before you can define a class or genus, but this was not accepted by the House of Lords in the case of *The Stag Line, Ltd.* v. *Foscolo Mango & Co., Ltd.* (*supra*). Even where the words in a charterparty permitted deviation from the voyage for " bunkering or other purposes " and the ship became a total loss after running aground through a deviation caused by dropping two engineers ashore at a port not in the strict course of the voyage, it was held that the word " bunkering " did limit the purposes to those of the contract adventure.

Another argument has been that if the specific words exhaust the genus there cannot be other matters *ejusdem generis*, and hence there can be nothing to limit the general words (Wright J. in *Lazard Bros., Ltd* v. *Brooks* (1932) 37 Com.Cas. 224, at p. 231). He continued " But the difficulty is to define the genus. The effect of the specific and general words taken together is often to signify a wider genus, and the nature and extent of that genus may often be ascertained by the general intent of the agreement." However, Asquith L.J. said in *Allen* v. *Emmerson* [1944] 1 All E.R. 344, at p. 347, that there was no case quoted in which a genus had been constituted by mention of a single class followed by general words. He also referred to the tendency to attenuate the principle. It is indeed not altogether easy to reconcile the various *dicta* on the matter.

For practical purposes it seems safe to state the following propositions as a general guide, most of them being taken from points made by Devlin J. in the *Chandris Case*:

(1) The draftsman should remember that he can easily exclude the rule by hoisting the appropriate signal. He can use phrases

such as " whether or not similar to the foregoing " or " without prejudice to the generality of the foregoing "; or at the end of the general words he can add " whatsoever " or " howsoever " which will usually have the same result (see the case of *Larsen* v. *Sylvester & Co.* (*supra*)).

(2) In interpreting documents it is a question of construction of the whole document which must be looked at in the light of all relevant circumstances including the presumed intention of the parties and the purpose for which the contract or document was prepared.

(3) Prima facie, general words are to have their natural and larger meaning unless the context cuts it down.

(4) The *Ejusdem Generis* rule is not a rule of automatic application but is merely an aid to ascertain the meaning of the parties.

(5) It is not absolutely necessary to find a genus in order that the rule may apply. There may be some limitation even if there is only one particular word or two or more words not forming a genus. In addition a wider genus may be formed by the combination of the general words with one or more particular words.

(6) In some cases words will indicate a genus; in others the general words will perform the simpler office of expanding the meaning of each enumerated item.

A NOTE ON THE NEW BUILDING BY-LAWS

By J. F. Garner, ll.m., Solicitor

The Minister of Housing and Local Government has recently issued a new model series of Building By-laws (*a*), for use under sections 61 and 62 of the Public Health Act, 1936; he has intimated that he desires all local authorities to adopt them as soon as possible (*b*), with only such variations as may be essential to meet genuine special local needs (*c*). As the model is very different in several important respects from its predecessor published in 1937, it is thought that a few observations on general principles might be of interest. Even solicitors in private practice may well be concerned with the application and interpretation of these by-laws; moreover, in the event of a dispute between the local authority and a building owner on the application of many of the by-laws in the new model, there seems to be ample scope for argument, owing to the style of the drafting (*d*).

The main object of the model, as stated by the Minister, is " to allow more freedom in the use of new materials and methods. Economy and the best possible use of materials are vital." In pursuance of this policy, the model provides that a building to which the by-laws apply shall satisfy certain functional requirements (*e.g.*, being capable of withstanding specified loads), rather than providing that particular materials or methods of construction must be used. As a particular example of this type of drafting it is provided in model by-law 13 that materials used shall be such as are suitable for the purposes for which they are to be used, and, further, that any material which complies with the requirements of an appropriate British Standard or (in the case of methods of mixing, etc.) British Standard Code of Practice, is to be deemed to

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(*a*) Series IV, published November, 1952, having been drafted with the assistance of an Advisory Committee, representative of a large number of professional and similar bodies.

(*b*) The building by-laws in force at present will be continued in force no longer than June 30, 1953: Building By-laws (Extension of Operation) Order, 1952 (S.I., 1952, No. 2087).

(*c*) This restriction, by Ministerial Circular, of the independence given to local authorities under the statute is open to grave objection from a constitutional point of view.

(*d*) The useful provisions of s. 67 of the Public Health Act, 1936, enabling a " question " to be referred to the Minister for his determination, should be utilised when appropriate.

comply sufficiently with this provision. This is really a fundamental clause in the model, and several points of legal interest arise in connection therewith:—

(1) it does not follow that because a particular material to be used complies with some particular British Standard, it must be "suitable" for the purpose for which it is to be used, in accordance with the by-laws; the standard appropriate to the individual work must be correctly selected (*e*);

(2) materials or work not complying with *any* British Standard or Code of Practice, may none the less comply with the by-laws, if they are in fact "suitable" for the particular purpose;

(3) there are 69 British Standards and seven Codes of Practice referred to in the model, and, in applying the by-laws, reference may have to be made to any one or more of these complicated and highly technical documents, which are thereby indirectly given the effect of subordinate legislation. To purchase a set of those referred to will be an expensive matter, although a complete set of *all* the Standards can now be obtained from the Institution for seven guineas.

The opportunities for genuine differences of opinion between experts on the application of these new by-laws will therefore be legion—especially where unorthodox methods of construction or materials are employed. One of the general requirements expected by the common law of all by-laws is that they should be reasonable in their operation, and we do not anticipate that provisions drawn in such general terms could be attacked on this ground (*f*), but, in preserving elasticity, we wonder whether the drafting committee have in all respects satisfied the other common law requirement of by-laws, namely, that they should be certain in their terms and of application. Factual standards are common in public health law generally (*g*), but these new by-laws will be found to apply the objective test of reasonableness in practically every clause—their predecessors, on the other hand, were too rigid in specifying, *e.g.*, exactly how thick a particular wall was to be, etc.

It is obvious that the new by-laws will be more difficult to administer from the point of view of the local authority; from the

(*e*) *e.g.*, there are eight different Standards for damp-proof courses, all of which may not be "suitable" for a particular type of site.

(*f*) As was done, *e.g.*, in *Att.-Gen.* v. *Denby* [1925] 1 Ch. 596.

(*g*) *e.g.*, "suitable and sufficient," in s. 38 of the Shops Act, 1950, "sufficient supply," of clean water, in s. 13 of the Food and Drugs Act, 1938, "satisfactory provision for drainage," in s. 39 of the Public Health Act, 1936. The model "clean food" by-laws made by a local authority under s. 15 of the Food and Drugs Act, 1938, also provide a very large number of examples of the application of a "reasonableness" test.

point of view of the building owner, it is suggested that, unless the authority are clearly being "unreasonable," arguments over the application of the by-laws are likely to be profitless. On the other hand, the practitioner who is instructed to defend proceedings brought for the enforcement of the by-laws should not lack fuel for his arguments.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Davies v. *Du Paver* [1952] 2 T.L.R. 890; [1952] 2 All E.R. 991

Profit—prescription—interruption—prescription "as of right"—Prescription Act, 1832, *ss.* 1, 4.—The defendant erected fences on what was undisputedly his own land to keep out the plaintiff's sheep, and the plaintiff, under the Prescription Act, 1832, claimed a right of pasturage over the land exercised by him and his ancestors for more than 60 years. The dispute continued while the fences were being erected, but afterwards there was a lull of some 13 months until the issue of the summons, during which time no step was taken at all by or on behalf of the plaintiff. The defendant sought to say that this was acquiescence or submission to his interruption for more than a year under section 4 of the Act of 1832, and that therefore the plaintiff could not succeed.

The county court judge found as a fact that there was no such acquiescence or submission, and the Court of Appeal (Singleton L.J. dissenting) refused to disturb his finding, which they agreed was a question of fact for the judge of first instance.

However, on the second point, the Court of Appeal found for the defendant on the ground that the plaintiff's user was not "as of right." Here they reversed the decision of the county court judge, as there was no evidence on which the judge could find as a fact that it was user "as of right." The servient tenement had, during the whole period which the plaintiff claimed to have exercised his rights, been occupied by a sitting tenant of the defendant's predecessors in title, and the plaintiff could not discharge the burden of proving that the defendant's predecessors had either knowledge or means of knowledge of his (the plaintiff's) rights.

There was apparently no argument before the court on whether the plaintiff's alleged right could be a profit at all, nor whether it was capable of being acquired by prescription. The right was apparently appurtenant to the plaintiff's adjoining farm, and was without any limitation as to the number of sheep to be pastured. Therefore it would appear to have been invalid in any event: see *per* Buckley L.J. in *Chesterfield* v. *Harris* [1908] 2 Ch. 421. Singleton L.J. did say, however, in the present case, "If the claim of the plaintiff is to succeed, the defendant is virtually deprived of the use of this piece of land, for the plaintiff can graze on it an unstated number of sheep at any time of the year."

Smith v. *Jones* [1952] 2 T.L.R. 846; [1952] 2 All E.R. 907

Sale of land—controlled purchase price—cost of making up roads not included—Public Health Act, 1875, s. 150.—In 1947 the plaintiff agreed to buy a house from the defendant, a builder, and it was stipulated that "the contract price should be the controlled price fixed by the government." This sum was found to be £1,065, and the sale to the plaintiff was completed. Two years later the local authority served a notice on the plaintiff under section 150 of the Public Health Act, 1875, requiring him to make up the road, and then having done the work themselves demanded payment of £50 odd as the plaintiff's share of the cost. The plaintiff then sought to recover this sum from the defendant, on the ground that in construing the contract the terms of the licence to build the house, together with the application for the licence, should be looked at. The application form provided that the maximum price should include the costs of roads, sewers and other services, and the plaintiff contended that this covered not only the roads, services, etc., which the defendant provided himself, but also the charge which was the subject of the suit.

Streatfeild J. decided firstly, that as the licence itself was unambiguous, there was no need to look at the application, and secondly, that even if he was wrong in this he did not think that, on reading the licence and application form together, they were intended to cover anything more than the roads, sewers and other services carried out by the builder himself. As the learned judge pointed out, the defendant would have to be gifted with great foresight to be able to estimate what charge the local authorities would be likely to make an indefinite number of years after the sale was completed.

Pride of Derby and Derbyshire Angling Association, Ltd. v. *British Celanese, Ltd. and Others* [1953] 2 W.L.R. 58; [1953] 1 All E.R. 179

Injury to fishery—pollution—action by riparian owner.—In this appeal from the judgment of Harman J. ([1952] 1 All E.R. 1326; see Vol. 16, p. 221), the Court of Appeal affirmed the learned judge's judgment in every particular as against the second defendants, Derby Corporation. (The first defendants had agreed to submit to an injunction at the commencement of the action.)

It was contended (inter alia) for Derby Corporation, that even if the plaintiffs had a cause of action, no injunction should be granted. It was going to be extremely difficult for many reasons to carry out the necessary alterations to Derby sewage works and, therefore, it was argued that, as an injunction is a purely discretionary remedy, the question whether it should be granted or not should be determined by the court solely upon the balance of convenience on one side or the other. The learned Master of the Rolls said that this was incorrect. "It is, I think," he said, "well settled that if A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is prima facie

entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstance that damages are an adequate remedy for the wrong that he has suffered. . . . Equally, of course, the court will not impose an obligation to do something which is impossible or which cannot be enforced, or which is unlawful. So the practice is adopted in the case of local authorities of granting injunctions, and then suspending their operation for a time, long or short." Therefore, the terms upon which the injunction was granted against the second defendants were affirmed.

As regards the third defendants, the British Electricity Authority, the Court of Appeal agreed to the qualification of the form of the injunction, which was the only point upon which they appealed. The injunction against the authority was limited so as only to prohibit them from returning the water to the river after using it, in such a condition as to cause injury to fish. The second plaintiff, the Earl of Harrington, had sued as riparian owner and not simply as owner of a fishery, but as he had made no complaint of having suffered damage to his riparian rights (see *per* Lord Macnaghten in *Young* v. *Bankier Distillery Co.* [1893] A.C. at p. 698) additional to the injury to his fishery, he was given liberty to apply for a further injunction should that ever be necessary.

Otter v. *Church, Adams, Tatham & Co.* [1953] 1 W.L.R. 156; [1953] 1 All E.R. 168

Entail—negligence—solicitor's failure to advise client.—The plaintiff was mother and guardian of M., and after his death his sole administratrix. She twice consulted the defendants as solicitors with regard to certain settled property which had fallen into M.'s possession, once before he attained his majority and again afterwards as his agent. M. meanwhile was serving with the R.A.F. in India. The plaintiff was advised by the defendants that M. had an absolute interest, and that there was no need for him to take any step to vest the property in himself. In fact, M. was entitled to an interest in tail male in the property, and therefore when he was killed in a flying accident, not having executed a disentailing assurance or made a will relating to the entailed interest, the interest passed to his uncle. The defendants' mistake was then discovered and the plaintiff brought an action on behalf of M.'s estate.

Upjohn J. held without hesitation that on the facts there had been negligence on the part of the defendants and a breach of contract. As the measure of damages in a case such as this was free from authority, it was argued that they could only be nominal as they would have been had the mistake been discovered in M.'s lifetime. But as the learned judge pointed out, the damages would not have been nominal had M. discovered the mistake and then died before he could rectify it. He held, therefore, that the damages naturally flowing from the breach were the loss to M.'s estate caused by the property passing to his uncle, and these were increased in view of the fact that the entailed property was money and not land, which

M. would have been more likely to have disposed of by will had he discovered the mistake in time. Although the damages were very difficult to estimate because of speculation on the action M. would have taken, this was no bar to their assessment. (*Chaplin* v. *Hicks* [1911] 2 K.B. 786.)

Re Kersey [1952] W.N. 541

Name and arms clause.—This is the latest in the series of cases on name and arms clauses which started with *Re Fry* [1945] 2 All E.R. 205, and was followed last year by *Re Lewis' Will Trusts* [1951] 2 T.L.R. 1032, *Re Bouverie* [1952] 1 All E.R. 408, and *Re Woods' Will Trusts* [1952] 1 All E.R. 740, see Vol. 16, pp. 5, 131, 219.

In the instant case, the husband of the present female life tenant was, under the terms of the clause, to take his wife's surname (see *Re Fry, supra*), and therefore Danckwerts J. held that the clause was void as against public policy. He could not conceive of anything more likely than this condition to cause differences between husband and wife.

Also included in the clause were the fatal words "discontinue to use" (see *Re Woods' Will Trusts* (*supra*)) which therefore, in addition, made it void for uncertainty. The learned judge condemned the fatuity of these attempts to impose obligations which were out of date and inconsistent with the spirit of the times.

Merrington v. *Iron Bridge Metal Works, Ltd.* [1952] 2 All E.R. 1101

Landowner's duty of care to firemen.—Hallett J. decided in this case on assize, that householders owe a duty of care to firemen who properly come onto their premises to attend a fire, not to expose the firemen to exceptional or serious risk of injury of which the householder knows or ought to know. The learned judge emphasised that his judgment rested on the particular facts of the case, but nevertheless, as this point is not as yet covered by authority, it is of some importance to the property owner to know what his position probably would be in these circumstances. It will be the same, apparently, even if the householder does not call in the fire brigade himself, but instead they come on his premises through the intervention of a passer-by or a policeman.

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2. *TRUSTS*

Re Downshire Settled Estates, Re Chapman's Settled Estates, Re Blackwell's Settlement Trusts [1953] 2 W.L.R. 94; [1953] 1 All E.R. 103

Inherent jurisdiction of the court—scheme to avoid tax—ambit of section 57, Trustee Act, 1925, and section 64, Settled Land Act,

1925.—These three cases, which were considered together by the Court of Appeal, are of great interest and considerable general importance both present and future. They constitute the first attempt for more than 50 years to discover the limits of the court's inherent jurisdiction to sanction the alteration of the terms of trusts and settlements. The first and third cases were appeals from Roxburgh J. (see note, Vol. 16, p. 383), and the second not previously reported, an appeal from Harman J.

In all three cases the sanction of the court was sought to a scheme of arrangement which involved, in effect, the rewriting of the trusts concerned. The avowed object of the schemes was a substantial saving of estate duty on the settled properties. This object, the court conceded, was no bar to their consent. The learned Master of the Rolls said: "It is not an objection to the sanction of any proposed scheme in regard to trust property that its object or effect is or may be to reduce liability for tax (including death duties)," and he referred to *Re C. W. M.* [1951] 2 K.B. 714. (See note, Vol. 15, p. 358.)

The plaintiffs based their appeals on two grounds, as at first instance. First, they argued that the court had an inherent jurisdiction to approve such schemes as those under consideration, provided that all parties *sui juris* consented, and that the scheme was shown to be to the advantage of all other persons, not *sui juris*, not yet born or unascertainable.

Secondly, it was argued that whatever might have been the position before 1925, the court had jurisdiction by virtue of either section 57 of the Trustee Act or section 64 of the Settled Land Act, 1925, to consent to the proposed scheme provided again that they were satisfied that the scheme was to the advantage of infants and unborn issue beneficially interested under the trusts.

Having considered the authorities at length, on the first argument, the Court of Appeal held (Evershed M.R. and Romer L.J., Denning L.J. dissenting) that on the binding authority of *Re New* [1901] 2 Ch. 534, and *Re Tollemache* [1903] 1 Ch. 457, its inherent jurisdiction was limited. These limits were described by the learned Master of the Rolls as "a power or jurisdiction to confer upon trustees, *quoad* items of trust property vested in them, administrative powers to be exercised by them as the persons in whom the property is vested (notwithstanding that such powers were not conferred by the trust instrument) where a situation has arisen in regard to the property (particularly a situation not originally foreseen) creating what may fairly be called an 'emergency'—that is, a state of affairs which has to be presently dealt with," not necessarily immediately, "and such that it is for the benefit of everyone interested under the trusts that the situation should be dealt with by the exercise of the administrative powers proposed to be conferred for the purpose. The power or jurisdiction does not . . . extend to changes or rearrangements of the beneficial interests *inter se* under the trust as distinct from rearrangements or reconstructions of the trust property itself."

However, to this principle Evershed M.R. found there were two exceptions:

(1) (Which has no bearing on the present cases.) Where the immediate beneficiaries, particularly in an accumulation trust, have no fund for their present maintenance, the court will presume an intent to provide for the family, and order maintenance (*Havelock* v. *Havelock* (1880) 17 Ch.D. 807).

(2) The court has power to approve compromises between persons *sui juris* and beneficially interested under a trust, on behalf of those who are interested but under a disability (particularly infants) and those who may become interested in the future. This is based upon *Re Trenchard* [1902] 1 Ch. 378. The word " compromise " should here not be narrowly construed so as to be confined to compromises of disputed rights.

Denning L.J. took a very liberal view of the whole problem, and, giving authorities from the seventeenth century onwards, said that he thought that the principle was still the same as that followed by Lord Hardwicke, namely, that the court had power to deal with the property and interests of infants or other persons under disability in a manner not authorised by the trust, whenever the court was satisfied that what was proposed was most advantageous for them, provided that everyone of full age agreed to it.

On the second argument Evershed M.R. and Romer L.J. found the effect of the two sections to be different. Dealing first with section 57 of the Trustee Act, 1925, they came to the conclusion that the vital words in it, " management or administration of any property," were confined to the managerial supervision and control of the trust property on behalf of the beneficiaries. This section has thus no connection at all with the beneficial interests arising under trusts. Evershed M.R. said: " The object of section 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual ' emergency ' had arisen, or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; but it was no part of the legislative aim to disturb the rule that the court will not rewrite a trust, or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction."

On the other hand, the words used in section 64 of the Settled Land Act, 1925, were, the court found, very different from those used in section 57. It was held that section 64 did clearly give power to the court in the case of settled land to approve " any transaction " whether benefiting the beneficiaries or the land itself, but the transaction must affect or concern the settled land or any other land whether settled or not, or whether in England or not, directly or indirectly, and if indirectly, then really and substantially by ordinary common-sense standards. It follows from this that if all the settled land has been sold the court has not any further power under section 64.

Denning L.J. approached the second argument also entirely differently, and again dissented from the majority view. He thought that the statutory provisions should not be read as delimiting the jurisdiction of the court, but rather as removing limitations which the court

had imposed upon itself. So, when it was held in *Re New* (*supra*) and *Re Tollemache* (*supra*) that a court of equity could not authorise a change of investments merely on account of benefit to the estate, section 57 was introduced into the Trustee Act, 1925, and section 64 into the Settled Land Act, 1925. The learned Lord Justice gave other illustrations and said: " we ought not to make the same mistake today."

The court then dealt with the instant cases individually.

In *Re Downshire Settled Estates* the land was held in strict settlement, and there was in effect a protected life interest vested in A, with remainder to his sons in tail (he had none), with remainder to B for life, with remainder to C absolutely. It was proposed that A and B should surrender their life interests to C in such part of the trust property as was represented by investments on the footing that the surrender should not cause a forfeiture of A's life interest. Powers vested in A and B to jointure and to charge portions on the investment fund were to be released, and an insurance policy taken out on the event of A having a son.

It was held that this was a " compromise " which the court could approve under the second exception to the general principle given above, a compromise in the broader sense of the word as it was used in *Re Trenchard* (*supra*). A offered to give up his present interest for the benefit of those next entitled, upon terms, and those next entitled accepted the offer. Also it was held that the scheme fell properly within the ambit of section 64, and was one which the court ought to approve.

In *Re Chapman's Settled Estates* certain land was held on trust for sale for the benefit of the settlors' grandchildren who should attain 21. It was provided that until the youngest grandchild should attain 25 or until the expiration of 21 years from the death of the survivor of the settlors, the trustees should hold the trust property on a discretionary trust for the common maintenance and education of the grandchildren, and that the balance should be accumulated. In 1952 it was realised that on the death of the survivor of the settlors a claim for estate duty would almost certainly arise in respect of the settled property, and therefore a scheme of arrangement was made whereby the trustees of the settlement should transfer the trust property to trustees of a new settlement embodying the same trusts but freed from the common maintenance provisions.

The Court of Appeal (Denning L.J. dissenting) affirmed Harman J. and held that they had no jurisdiction to sanction the scheme, either under section 57 or under the inherent jurisdiction. The scheme, the learned Master of the Rolls thought, did not involve the composition of rights at all. It was nothing more than a rearrangement of beneficial interests which, to the extent that it might prove to be of advantage to some of the grandchildren, would correspondingly operate to the prejudice of the others, *i.e.*, those who would otherwise have had more than an equal share for their benefit. Evershed M.R. said also, subject to what he had said earlier on this point, " We would point out . . . that it is no part of the functions of Her Majesty's courts to recast settlements from time to time merely with a view to tax avoidance even if they had power to do so. . . ."

Denning L.J. dissented for the reasons given above, and said: "If the Court of Chancery should refuse its consent to this scheme the paradoxical situation will be reached that the court, whose function it is to protect the interests of the grandchildren, shows itself to be their own worst enemy. The grandparents are ready and anxious to correct the mistake. So is everyone else. If the grandchildren and unborn persons were at liberty to consent, any prudent adviser would tell them that they ought to consent because the scheme is so greatly advantageous to them. Is the court to stand in the way . . . ?"

In *Re Blackwell's Settlement Trusts* there was a voluntary settlement of personalty by the settlor on himself on protective trusts for life with a power of appointment among his children, and, in default, among his children in unequal shares. The settlor was paying income tax at 19s. 6d. in the pound on the settlement income, and if he died the rate of estate duty on the settled property would be 65 per cent. He had one son born in 1951. He therefore asked the court to sanction a surrender of his life interest in half the settled fund, on the footing that the discretionary trusts should be released in respect of the surrendered portion, and that his life interest should not be forfeited in the portion he had retained.

The court held that this was a "compromise" in the wide sense similar to that in the *Downshire Case* (*supra*), which it had power to sanction, though again it had no power to sanction the scheme under section 57.

There is much food for thought contained in the 40-odd pages of these judgments. With respect it is certainly very difficult not to agree with Denning L.J.'s point of view in *Re Chapman's Settled Estates*. It would seem that it is as yet by no means clear what arrangements will be considered to be "compromises" and what not. As section 64 will not apply to the majority of cases, trustees applying to the court for approval of a scheme will still do so with some measure of uncertainty.

Re Aberconway's Settlement Trusts [1952] 2 T.L.R. 797; [1952] 2 All E.R. 981

Settlement—provision preventing tenant for life from exercising statutory powers—Settled Land Act, 1925, *s.* 106.—In this case Danckwerts J. followed *Re Patten* [1929] 2 Ch. 276. By a settlement made in 1926 certain shares were settled on trust for the development and assistance of certain gardens belonging to the settlor, during such period of the lives of certain persons and 21 years from the death of the survivor "as the said gardens . . . shall be and remain settled . . . or shall remain vested in the trustees or trustee." This period was referred to in the settlement as the "prescribed period." The gardens themselves were settled in 1933 under the terms of the settlor's will. In 1949, owing to taxation, the tenant for life was forced to sell five-sixths of the gardens to the National Trust, and the question arose as to whether the trusts created by the settlement of 1926 were still effective.

It was argued that, as under the terms of the sale to the National

Trust the objects of the settlement of 1926 would be carried out substantially in the way the settlement contemplated, and that, as it could also be said that the settlement envisaged that the gardens might expand or contract, that therefore the prescribed period was still operative even though five-sixths of the gardens had been conveyed away. But the learned judge rejected this contention on the construction of the words quoted above, and held that the prescribed period had come to an end.

The next question was whether the words in question were nevertheless void under section 106 of the Settled Land Act, 1925, as an attempt to interfere with the statutory powers of the tenant for life. On the construction of the section it was clear that it did not matter that the provision was not contained in the settlement of the land itself, or that it was a provision intended to apply to a future settlement of land. After considering *Re Patten* (*supra*), Danckwerts J. came to the conclusion that the provision was void. He held that the effect of this was to leave the prescribed period untouched, and that the trust should remain effective during the lives named in the settlement and 21 years thereafter.

The learned judge did not deal with one final point which he noted he was not asked, *viz.*, was the conveyed portion of the garden subject to the powers of the trustees? There would appear to be no reason why not.

Re Waterman's Will Trusts [1952] 2 T.L.R. 877; [1952] 2 All E.R. 1054

Trustee corporation—money placed by bank on deposit with itself. —This can certainly be described as a disquieting case. A testatrix appointed a bank to be her executor and trustee, and, by the charging clause in the will, the bank could " without accounting for any resultant profit act as an attorney and perform any service on behalf of the estate on the same terms as would be made with a customer." A summons was taken out for the construction of the will, and was adjourned at the direction of Harman J. for further investigation when it appeared that the amount of interest earned by the estate in the year preceding the summons was ludicrously small. It transpired that as the whole of the estate consisted of cash, the bank had thought fit to place the whole sum on deposit with itself, and it had thus earned only one-half per cent. interest.

The learned judge found it impossible to raise the question of breach of trust as the suit was started by summons and not by writ, and also because no beneficiary desired to attack the bank. He was therefore compelled to assume, contrary to all appearances, that the bank had shown no more than an excusable want of judgment. The question which arose therefore was not whether there was a proper investment of the money, but whether the bank could be made accountable for the difference between the half per cent. actually received by the estate, and the 5 per cent. interest which an ordinary private trustee would have had to pay had he invested the money in his own business. The bank, however, had no qualms in saying that the

charging clause in the will dispensed with the usual penalties, and enabled them to make, in effect, a profit of 4½ per cent. at the beneficiaries' expense. It was argued that the words, "without accounting for any resultant profit," justified the bank in putting the money on deposit as with an ordinary customer, and then earning upon it what it could. The learned judge said: "Whether any testator asked to sign a charging clause in these terms would guess that this profit might be made at his expense, I very much doubt."

With great hesitation, Harman J. held that, on the narrow view in which he was considering it, the clause did suffice to render the bank unaccountable for the profit it had earned, on the ground that a similar deposit of the trust money with another bank would have been a proper use of it.

Re Masters [1953] 1 W.L.R. 81; [1953] 1 All E.R. 19

Corporate administrator—right to remuneration—Trustee Act, 1925, s. 42.—In this case Danckwerts J. held that the court had jurisdiction under section 42 of the Trustee Act, 1925, to authorise remuneration to be paid to a corporate body appointed by the court to be administrator and trustee of the estate of an intestate. Sections 68 (17) and 69 (1) show plainly that for the purposes of the Act the duties of a trustee include those of an administrator, and therefore the court has power to order proper remuneration to be paid to any corporation appointed by the court to act in either capacity. This view has already been adopted in the Probate Division. (*In the estate of Young* [1934] W.N. 106.)

The learned judge said also that, apart altogether from section 42, there is an inherent jurisdiction in the court to authorise remuneration of any trustee, individual or corporate, whether appointed by the court or not, and he referred, inter alia, to *Re Freeman's Settlement Trusts* (1887) 37 Ch.D. 148, and *Re Macadam* [1946] Ch. 73.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Baddeley v. *I. R. C.* [1953] 1 All E.R. 63

Trusts for recreation and amusement not charitable.—In this case the trusts included, inter alia, trusts for recreational benefits for Methodists unable to afford such recreation themselves. Harman J. held that the trusts were not "for charitable purposes only" under the Stamp Acts. The funds could be used, in his opinion, for dances, teas and whist-drives. "Relief of the poor" means satisfying pressing needs, not providing pleasure. The fact that recreations of various kinds are often State-aided today does not make them charitable in the technical sense. (The decision is in the clear line

of older cases and reflects, perhaps, a rather Puritanical tradition in this part of the law, not alien to the original pre-Reformation notions of charity, though little compatible with the generous doctrines of the Gospels themselves, and the Son of Man who came "eating and drinking" (St. Luke, vii, 34; St. Matthew, xi, 19; St. Mark, ii, 16).) The learned judge followed the decision in *Londonderry* v. *I. R. C.* [1946] N.I. 178. An earlier case of a similar kind was the decision in *Re Nottage* [1895] 2 Ch. 649.

(Theobald 279.)

Re Buzzacott, decd. [1952] 2 T.L.R. 884; 2 All E.R. 1011

Government control of hospitals.—Two hospitals were designated as teaching hospitals under the N. H. S. Act, 1946. The Board of Governors "manage and control the hospital on behalf of the Ministry" (section 12 (3)), and can override the terms of previous trusts so far as inconsistent with the Act. It was held that the hospitals had come under Government control and a gift over, limited in this event, therefore operated. The case illustrates the effectiveness of draftsmen's attempts to prevent private charitable funds being diverted to State welfare services.

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

In the Estate of Wallace, decd. [1952] 2 T.L.R. 925

Testator's recognition of document as will.—This case was tried by Devlin J. at Bodmin Assizes. The testator wrote a draft of his will. His solicitors prepared a formal will containing the same provisions. The testator then executed this will, but without reading it. It was held, following *Perera* v. *Perera* [1901] A.C. 354 (at 361), that the will was valid and admissible to probate. This rule, like so much of English property law, depends on the special confidential position of solicitors.

(Theobald 26.)

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5. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Dominant Sites, Ltd. v. *Hendon Corporation* (1952) 3 P. & C.R. 245; [1952] 2 T.L.R. 914; [1952] 2 All E.R. 899; 117 J.P. 29

Control of advertisements — area covered by "old" planning scheme.—This was yet another case upon the transitional provisions of

the Town and Country Planning Act, 1947. Certain land, in respect of which the Hendon Corporation were the responsible authority, was the subject of a planning scheme under the Town and Country Planning Act, 1932. This scheme, being in force when the 1947 Act came into force, was preserved by Sched. X of the 1947 Act, para. 7, so far as concerned (inter alia) the control of advertisements. That para. 7 gives the Minister power to put an end to the scheme; but until he does so, the Hendon Corporation remain entitled (under section 47 of the 1932 Act) to demand the removal of advertisements erected without consent upon the land with which this case was concerned: subject, however, to a right of appeal to the local magistrates on the ground that the advertisements concerned do not seriously injure amenity. The Control of Advertisements Regulations under the 1947 Act, however, entitle the local planning authority (here the Hendon Corporation, not in their own right but under powers delegated by the Middlesex County Council) to secure the removal of advertisements whether they " seriously injure amenity " or not. The question in this case was: Could the Hendon Corporation, by proceeding under the 1947 Act, instead of under the 1932 Act, destroy the right of appeal that the 1932 Act gave? The Divisional Court, by a two-to-one majority, held that it could: the conclusive point being, that powers of control under the two Acts were vested (notionally, at least) in different local authorities. The Lord Chief Justice added that the Acts were complicated enough without this sort of thing and hoped that the Minister would clear up the mess. No doubt the Ministry will now do so: they might have done so earlier. It is no secret that the law of advertisement control is obscured by several patches of thick fog.

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6. *LANDLORD AND TENANT CASES*

By J. Muir Watt, m.a., of the Inner Temple, Barrister-at-Law

Murray, Bull & Co., Ltd. v. *Murray* [1952] 2 All E.R. 1079

Licence or tenancy—retention by employee of flat by consent after termination of employment—intention that occupant should be licensee only.—This is another of the licensee cases which have recently introduced a somewhat new conception into the common law—that of licences which confer exclusive possession: see *Foster* v. *Robinson* [1951] 1 K.B. 149; *Marcroft Wagons* v. *Smith* [1951] 2 All E.R. 271; *Errington* v. *Errington* [1952] 1 All E.R. 149. The facts in *Murray's Case* were rather unusual. The managing director of a company had been given the tenancy of a flat in the building which housed the company's laboratories and offices; the company's business, that of consulting and analytical chemists, was of a confidential nature. The tenancy was a proper tenancy, not a service occupancy, and the rateable value of the flat was within the Rent Restrictions Acts. The tenancy was originally for seven years or until the termination of the tenant's managing directorship, whichever period was the shorter.

At the end of the seven years the tenant remained in possession of the flat, and continued as managing director until 1950, when he relinquished his appointment. At his request he was allowed to continue to occupy the flat, "under conditions which do not establish me as a controlled tenant," in order to have time to look around for other accommodation. He continued to pay rent at the same rate as before, and was referred to in an exchange of letters as a "tenant," but the company made it clear that it might wish him to vacate the flat in the near future. When the company asked him to give up possession, however, he claimed to be protected by the Rent Restrictions Acts, either as a statutory or as a contractual tenant. McNair J. held that the arrangement under which he continued in possession after relinquishing his managing directorship was a licence and not a tenancy. It may be noted that McNair J. held that when the seven-year term came to an end the tenant remained in possession as a contractual and not as a statutory tenant. He pointed out that whether a tenant who holds over after the expiry of a fixed term does so as a contractual or statutory tenant depends on the circumstances. Normally, where the relationship of the parties is merely that of landlord and tenant, the inference is that a statutory tenancy arises on the expiration of the fixed term. The facts here were different, however, the fundamental relationship being that of employer and employee. If McNair J. had found that a statutory tenancy had arisen he would have felt the greatest difficulty in holding that it could have been replaced by an occupation under licence. He expressed doubt about the correctness of the following proposition from the judgment of Lord Asquith of Bishopstone in *Rogers* v. *Hyde* [1951] 2 All E.R. 79 at p. 81:—

> "If it was a statutory tenancy, there is recent and binding authority for the proposition that a contractual (and non-protected) tenancy can replace a statutory tenancy by a notional surrender and regrant or by other means: see, for instance, *Foster* v. *Robinson*. . . ."

McNair J. expressed the "provisional" opinion that a statutory tenancy could only be brought to an end by the actual giving up of possession or by an order for possession.

M. & F. Frawley, Ltd. v. *Ve-Ri-Best Co., Ltd.* [1953] 1 W.L.R. 165

Leasehold Property (Temporary Provisions) Act, 1951—meaning of "shop"—"retail trade or business"—builders and decorators. —The short point in this case was whether premises occupied by builders and decorators were a "shop," within the meaning of Part II of the Leasehold Property (Temporary Provisions) Act, 1951, so as to enable them to apply for a new tenancy under section 10 (1) of the Act. By section 20 (1) of the Act "shop" is defined to mean premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business. "Retail trade or business" has, within certain exceptions not here material, the same meaning as in the Shops Act, 1950. Only an

insignificant part of the business carried on on the premises in this case consisted of the actual sale of goods—paint, brushes, packets of cement, etc. It was, however, argued that the premises were used for " retail trade " because the builder's and decorator's work was done for the actual customer, although on the latter's premises, and not for a middleman; in other words, there was direct contact with the " consumer." The Court of Appeal, however, reversing the county court judge, refused to stretch the conception so far. They held that although " retail trade or business " was not confined to the actual sale of goods to the public it could only be extended by analogy to the sale of services where the latter could, like the services of a hair-dresser, or a shoe-repairer, or a watch-mender, be rendered on the premises to customers resorting to the premises. The services of builders and decorators were, on the contrary, rendered away from the premises on the properties of the customers. A new tenancy could not, therefore, be granted, under Part II of the 1951 Act.

Bradley-Hole v. *Cusen* [1953] 2 W.L.R. 193; [1953] 1 All E.R. 87

Rent Restrictions Acts—overpayment of rent—right to deduct from future payments—right of deduction available against landlord's trustee in bankruptcy.—The Court of Appeal held in this case that, assuming the correctness of the decision in the Irish case of *Murray* v. *Webb* (1925) 59 Ir.L.T. 41 (that a tenant's right to recover overpayments of rent under section 14 (1) of the 1920 Act is confined to a right against the landlord who has been overpaid and does not extend to his successor in title) the right is available against the landlord's trustee in bankruptcy. The trustee in bankruptcy is not quite in the position of an ordinary assignee, but steps into the debtor's shoes and takes his property subject to all clogs or fetters or liabilities affecting it in the hands of the debtor himself: *Bendall* v. *McWhirter* [1952] 2 Q.B. 466. It is to be noted that Jenkins L.J., who delivered the principal judgment, expressly reserved the correctness of the decision in *Murray* v. *Webb*. The dicta of Cohen L.J. in *Kitchen's Trustee* v. *Madders* [1950] Ch. 134, which appeared to throw doubt on the availability of the right to recover overpayments against the landlord's trustee in bankruptcy, were treated by Jenkins L.J. as inconclusive, since they were directed to a right of set-off under the Bankruptcy Act, 1914, and not to the right of deduction given by section 14 (1) of the 1920 Act.
(Rent Restrictions Guide, 3rd ed., p. 62.)

Newton v. *Biggs* [1953] 2 W.L.R. 203; [1953] 1 All E.R. 99

Rent Restrictions Acts—purchaser grants tenancy to vendor of house—whether purchaser becomes " landlord by purchasing "—1933 *Act, First Schedule, para. (h).*—Where, as part of the agreement for sale of a house, it is arranged that the vendor should remain in possession of part as tenant of the purchaser, the purchaser does not become

" landlord by purchasing," within the meaning of para. (*h*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, as amended. He becomes the *owner* of the house by purchase, it is true, but not the *landlord*. The object of the exception in para. (*h*) of a landlord who has become a landlord by purchase is to protect the sitting tenant from having the house bought over his head: *Epps* v. *Rothnie* [1945] K.B. 562; *Fowle* v. *Bell* [1947] K.B. 242. (Rent Restrictions Guide, 3rd ed., p. 93.)

Kent v. *Conniff* [1953] 2 W.L.R. 41; [1953] 1 All E.R. 155

Agricultural Holdings Act, 1948—*landlord's right to bring an action for damages during the continuance of the tenancy*.—The Court of Appeal have upheld the decision of Slade J. in this case, which was dealt with in these Notes for July–August, 1952, at p. 306, and was the subject of an article in the September–October issue (pp. 372–9). The present writer remains of the opinion that the difficulties of the view adopted by Slade J. and now by the Court of Appeal have not been convincingly met by either. There are important arguments in favour of the decision reached, it is true, but it would have been more satisfactory if the arguments against it had been fully discussed. Why, if the view taken is right, was section 57 (3) enacted at all?

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7. *MISCELLANEOUS*

Vaughan v. *Vaughan* [1953] 1 W.L.R. 236; [1952] 1 All E.R. 209 (C.A.)

Matrimonial home—divorce—right to possession.—In this case the husband owned the matrimonial home, which he left in February, 1948, telling the wife that she could always live there. The wife obtained a divorce in 1950 and thereafter the husband sought to recover possession. It is now well settled that any licence implied by law enabling a wife to remain in a matrimonial home comes to an end on divorce. It was held that the statement by the husband was not contractual in nature and that the licence granted by him was therefore revocable after the divorce. As the husband agreed to the wife's remaining in possession for six months the question, what amounted to reasonable notice, was not in issue and an order for possession in six months' time was made in favour of the husband. Two incidental points may be noted: the institution of proceedings for possession amounts to revocation of the licence (*per* Evershed M.R. [1953] 1 W.L.R. at p. 238); and, secondly, had the licence been contractual, it would have been a " post-nuptial settlement " within the jurisdiction of the Divorce Court, which could then decide whether or not the husband should get possession and, if so, on what terms: see *Halpern* v. *Halpern* [1951] P. 204 (*per* Denning L.J. at p. 240).

THE LIBRARY

Current Law Consolidation, 1947–1951. General editor: JOHN BURKE, Barrister-at-Law; Consolidation editor: CLIFFORD WALSH, LL.M., Solicitor. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1952. 11,123 paragraphs and dclxxvii and 53 pp. (£9 9s. net.)

Current Law and the *Current Law Yearbooks* are too well known to need an introduction. We do not suppose anyone reads them for sheer pleasure: digests are always indigestible; but most practitioners found themselves compelled to subscribe to them. It is not just a question of being able to lay one's hands on recent decisions—though the value of this, so far as concerns cases not reported in the principal sets of law reports, should not be overlooked—far more important is it to be able to feel that no facet of a particular problem or subject has been overlooked. The monthly parts and even the yearbooks mainly serve the limited purpose of keeping the practitioner up to date; the *Consolidation* has a more permanent value which will increase as time goes by. This is well brought out by the statute citator. (We suppose it is too late to register a protest against the words "citator" and "noter-up," but would the publishers please tell us their derivatives? Does a person who uses a citator become, like a practitioner of the typewriter, a citist? And are noter-uppers and swan-uppers different species of the same *genus?*) In this table it is possible to trace every section (and, indeed, subsection) that has been affected, used or even commented on during the five years covered. Not only are all the cases touching on the section set out, together with the reference to the paragraph in the *Consolidation* where they are digested, but all regulations and instruments made thereunder are specified with a similar reference. Repeals, amendments and so on are noted. There are also case and statutory instrument citators. The former is not confined to cases from 1947 onwards, but includes all earlier cases which have been considered, overruled, distinguished, etc. The statutory instrument citator only deals with orders and instruments from 1947 onwards. It is thus possible to trace the whole history of a section of a statute, a case or a statutory instrument from 1947.

Of the main part of the book it is difficult to say much; we do not know whether it really does cover all the law from every source, but, so far as we have been able to test it, it appears to do so and to do it succinctly but clearly. The arrangement is excellent. There should be little excuse in the future for incidents such as the conviction before the war under an Act that had not been brought into force, or the series of convictions during the war under regulations that had been revoked. The *Consolidation* is boldly marked "1" but we have no doubt that the publishers will prove justified in their confidence that future consolidations will follow. It is trite to say that a book under review should be in every lawyer's library; it is rarely, if ever, true. *Current Law*, however, is the most important addition to the practitioner's tools of trade since the war and a purchaser of the *Consolidation* would soon recoup himself the nine guineas laid out by the amount of work saved.

E. F. G.

Intestacy and Family Provision. By J. Gilchrist Smith, ll.m. London: Solicitors' Law Stationery Society, Ltd. xxii and 126 and (appendices) 70 pp. (28s. 6d.)

This book sets out to deal fully with the law of Intestacy and of Family Provision and, as is to be expected from the Editor of the current edition of Emmet, it does so in a most thorough fashion. Its comprehensiveness is somewhat vividly indicated by the fact that pp. 81–86 are devoted to the general principles of drafting assents, and pp. 94–96 to the statutory provisions for maintenance and advancement.

Part I deals with intestacy—both as to the beneficial interests taken and as to the "machinery" of administration—the devolution of estates and dispositions by administrators. The author, at p. 18 and p. 89, has no doubt that a sole administrator cannot appropriate to his or her own share and he may very well be right; but it would have been interesting to have his views on the contrary argument advanced at Vol. 16, p. 417–9. At Appendix A is to be found an admirable summary of the pre-1926 rules of succession—which is something the younger of us can never find to hand let alone call to mind. At Appendix F is printed the annuity tables required to calculate the value of the surviving spouse's life interest.

The other appendices are mainly devoted to reprinting the relevant statutes both as originally enacted and as amended by the Inheritance (Family Provision) Act, 1952, and this notwithstanding that that Act itself sets out the original statutes as amended. Is this really necessary? Is there a practitioner who does not have to hand the statutes as supplied by the Council of Law Reporting, or by *Current Law* or by Halsbury? If he has paid for one copy does he wish to pay, at current prices, for another copy bound up in a textbook? Your reviewer has no doubt that in this book the practitioner will find all the guidance that any book can give about the subject but he, for one, would have preferred it without the statutes and for a few shillings less.

G. B. G.

Hayes & Jarman's Concise Forms of Wills. Eighteenth edition. By K. W. Rubin, ll.b., Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1952. xc and 321 and 10 pp. (£3 10s.)

This edition is unsatisfactory: it is ill-arranged, poorly indexed and old-fashioned in its layout. Whatever scheme of arrangement the editor had, he has kept locked in his breast. To take two illustrations, precedents 15 to 22 deal with traders' wills, but 17 deals with a solicitor's and 20 a farmer's; powers of executors and trustees are found on pp. 192, 215 to 218 and 220, but a precedent dealing with deferred annuities is incongruously inserted on p. 216. "*Commorientes*" does not appear in the Index and to find a *commorientes* clause—and a special one at that—the easiest way appears to be to look up *Hickman* v. *Peacey* in the Table of Cases. Powers of executors appear neither under "powers" nor "executors," but it is true that they will be found under trustees. The headings of all the precedents of separate clauses are all marginal as are the headings of notes. This is sometimes confusing and nowhere satisfactory; nor are the headings always enlightening; the marginal heading to a note on the rule in *Howe* v. *Dartmouth* is "Rules deduced from the cases"—the easiest way of tracing the passage is to look up *Brown* v. *Gellatly* in the Table of Cases—and one precedent is entitled "Locke King's Act principle excluded." How many solicitors could say

without hesitating that this is a clause throwing the burden of mortgages onto the residue?

Turning to the precedents, we first note that apparently bachelors and spinsters do not execute wills. In the precedents for complete wills two clauses are standard, an investment and a charging clause. *Commorientes* clauses, powers to raise capital and powers extending the statutory powers of maintenance and advantages are still, apparently, regarded as abnormal. There are three investment clauses given: one gives power to invest in a particular company, one gives power to invest in securities quoted on the London Stock Exchange and one is a lengthy clause setting forth a long list of investments. At the end of this last precedent there is a clause empowering investment in or upon such investments as to the trustee may seem fit. Should not this be a separate precedent? When it is borne in mind that a widow is so often the chief beneficiary, it is a little astonishing to find that none of the clauses provides for the purchase of a house for her. There is a clause covering this, the *sixth* precedent where the testator leaves a widow. Tracing this clause is not easy—it cannot be found in the Index under "investment," "house" "purchase"—we looked up *Re Power* in the Table of Cases. Neither of the general investment clauses seems to us satisfactory. The trustees need the widest powers of investment today; the exercise of the powers is a different matter. The editor always gives the residue on trust for sale with power to postpone. Why does he not give it on trust to retain or sell? Few testators would relish the idea of their portfolios, carefully built up over many years, being broken up. After all, there is a most material difference between the two forms.

A precedent giving trustees power to construe the will is given at p. 200, but there is no reference to *Re Wynn* [1952] 1 All E.R. 341, which held it to be invalid, though it is true that there is a note on the precedent and a reference to *Re Raven* [1915] 1 Ch. 673, after the succeeding precedent. It seems doubtful whether the editor considered sufficiently the questions of income tax and death duties; it is not that his law is wrong, but he ought to have put his "free of duty" clauses together with a note to guide the draftsman, and he could certainly have improved the standard precedent of a will in favour of the widow and children so as to obtain the maximum benefits so far as taxation is concerned.

The notes are erudite and thorough, but have a serious drawback. They are often much longer than the precedent and the practitioner may be left wondering whether the precedent is what he wants after all. Numerous cases are cited but there are too many prefaced with the words "And see" or "But see." Indeed the most serious criticism is that there is far too much dissertation on the law of wills generally; the notes to the precedents should have been confined to necessary explanations and a general dissertation might have been placed at the beginning of the work. In fairness to the editor it should be pointed out that he is not responsible for the style of the book and cannot be blamed for not producing an Elizabethan *Rubin* instead of a Victorian *Hayes & Jarman*.

E. F. G.

We have also received:—

The Law of Municipal Contracts with Annotated Model Forms. By Charles S. Rhyne of the District of Columbia Bar. Washington, D.C.: National Institute of Municipal Law Officers. 1952. 192 pp. ($7.50).

The Modern Law Review. January, 1953. London: Stevens & Sons, Ltd. 128 pp. (7s. 6d.) Professor Cheshire's lecture on "A New Equitable Interest

in Land," which is reproduced here, is of considerable interest, for he enthusiastically approves the decision in *Errington* v. *Errington* [1952] 1 K.B. 290, regarding *Clore* v. *Theatrical Properties, Ltd.* [1936] 3 All E.R. 483 (C.A.) as wrongly decided, though he does not explain why the Court of Appeal should not have been bound by it. He brushes aside the serious practical conveyancing difficulties, which he does not appear to have considered fully from the point of view of a building society.